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Fisheries Law and Enforcement

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Summary

This text provides a general introduction to the laws, agencies, and issues involved in fisheries regulation, particularly in Alaska, originally intended for an introductory course on regulation as part of an extensive curriculum in fisheries at Kodiak Community College, University of Alaska. The text covers international, federal, and Alaska fisheries law through 1982; the history of fisheries and fisheries law in Alaska; federal, Alaska, and local agencies which affect fisheries; and the justice system, law enforcement practice, and individual rights within the maritime context.

FISHERIES LAW AND ENFORCEMENT

JUSTICE CENTER

University of Alaska, Anchorage
Anchorage, Alaska

FISHERIES LAW AND ENFORCEMENT

by

John E. Havelock with
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and
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Justice Center
University of Alaska, Anchorage
September, 1982

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PREFACE AND ACKNOWLEDGMENTS

The authors wish to thank the many officials of the fisheries law and enforcement community of Alaska who gave generously of their time in providing much of the material making up the substance of this text. Any errors contained herein, as well as any opinions, are those of the authors and not of source agency personnel. We wish also to thank the Kodiak Community College and its President, Carolyn Floyd, who gave early financial support to this project and the encouragement in the undertaking without which this volume would not have been produced. Special thanks go to Phyl Booth whose careful scrutiny of the text for abuses of English usage and spelling and word processing skills have assured that this text passes muster in matters of form.

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PART I. The Allocation of Power Over Fisheries

Introduction

Fisheries law must often seem to both the fisherman and the enforcement officer a quagmire of petty regulations which irritate and hinder both in the performance of their work. The law officer may feel that the explicitly regulated procedures required to board and inspect a fishing vessel thwart effective policing, while the fisherman may feel the inspection itself to be an unwarranted intrusion upon his right to earn a livelihood. Both are likely to question the sense of the regulations which constrain their actions.

In examining fisheries law, then, it is important to provide not just a summary of these regulations but also a sense of their reason for being, and to examine the social, political, economic and legal forces which have shaped them.

Fisheries law can never be approached as merely a local matter. Any study of this area of law and its enforcement must recognize from the beginning its national and international aspects and its implications for other areas of human enterprise. In the following pages we will discuss some of the issues involved in fisheries law, at first broadly and then, in later chapters, in more detail, with the hope that upon completion of the course the student will have not only a grasp of the most important laws and regulations as they affect his life, but also an understanding of the field as a whole.

The first chapter of this study will present an overview of the questions of jurisdiction which most affect fisheries law: the existence of maritime limits and the influence of national and international concerns on these limits, the changing law of the sea and the United Nations, constitutional issues of jurisdiction and the background to federal and state participation in fisheries regulation, and, finally, the influence of developments in other areas on fisheries law.

The second and third chapters will deal specifically with current legislation affecting fisheries and the agencies which implement this legislation, while the fourth chapter will examine questions of enforcement and prosecution. The final portion of the course will briefly discuss those issues which are likely to affect fisheries law in the future. Throughout the study Alaskan fisheries and the effects of legislation and regulation upon their management will receive particular attention.

The National Jurisdiction

The making and enforcing of laws require agreement upon the limits of jurisdiction. Jurisdiction may generally be considered as legal authority, whether over a physical area or over a class or type of concern. For example, it can be very simply stated that the United States government exercises jurisdiction over the fifty states, its territories and the District of Columbia; this type of jurisdiction implies authority over a physical area. Another type of jurisdiction also exists -- that over a particular type of concern or issue; for example, the federal

government has jurisdiction over the regulation of interstate commerce.

This definition is only the most simplistic explanation of the concept of jurisdiction, but it is important to note that the concept, with all its complexities, is at the heart of national and international law. The specific effects of jurisdictional issues on fisheries and maritime law will become more apparent later, but, from the outset, an awareness of the centrality of these concerns is necessary for an understanding of the development of fisheries law.

Jurisdictional Limits

The setting of physical limits to national jurisdiction would seem to be perhaps one of the least complicated of questions, but in the context of the maritime world the physical boundaries to national authority are currently the subject of much debate.

Traditionally nations have claimed an offshore territorial sea over which they possess complete sovereignty; that is, a nation exercises total jurisdiction over its territorial sea as if it were an extension of the land mass. In the United States certain types of jurisdiction within this sea are reserved to the individual states. In modern times the width of the territorial sea has been a matter of controversy which is as yet unresolved. Many countries, including the U.S., claim a territorial sea of only three miles. This claim has its basis in decades of established international practice. Within the past thirty

years, however, numerous nations have attempted to expand the width of their territorial seas, either through unilateral declaration or through international negotiation at various United Nations conferences. Several Latin American nations have proclaimed territorial seas of two hundred miles, and many other nations, especially those former colonies which have become independent since World War II and which are often called "developing" countries, now have claimed twelve mile territorial seas.

The tendency seems to be toward increased jurisdiction over wider and wider areas. Such "creeping jurisdiction" inevitably complicates the conduct of commercial and military navigation. The United States, as a major military and commercial power, has traditionally opposed any extension of the territorial sea in the belief that such expansion would impede freedom of passage in strategically important parts of the globe. In the politically volatile Persian Gulf, for example, extension of the territorial seas could conceivably endanger movement in the Strait of Hormuz through which much of the oil supply of the free world passes.

However, despite its opposition to expansion of the territorial sea in which a nation exercises complete sovereignty, the United States does recognize the right of nations to exercise certain types of limited jurisdiction over significantly wider maritime zones. As sanctioned by the Geneva Convention on the Territorial Sea and Contiguous Zone, the U.S. claims a contiguous zone from three to twelve miles offshore in which a nation can

prevent infringement of fiscal, immigration and sanitary regulations within the territorial sea itself.

In addition to the three and twelve mile limits, the U.S. now also claims a two hundred mile exclusive fishing conservation zone. Within this area, which was established by the Fisheries Conservation and Management Act of 1976, the United States asserts its authority to control and regulate all domestic and foreign fishing. Under the terms of the same Act the U.S. also claims jurisdiction over certain anadromous species which range far beyond two hundred miles. We will discuss the terms of this Act in much greater detail later. It is important for now to remember that the zone from three to two hundred miles is not a territorial sea; that is, the U.S. does not exert total jurisdiction in the area; it only regulates certain activities.

The United States also exercises limited jurisdiction in another area: its continental shelf. Since accepting the Geneva Convention on the Continental Shelf in 1964 the U.S. has claimed control over all of the natural resources of the seabed and subsoil of the shelf. The term "continental shelf" refers to the underwater plain of varying width which borders nearly every continent. Waters above this shelf are relatively shallow, and at its outermost edge the shelf drops fairly steeply to the deep seabed. The Convention provides a legal definition of the shelf which sets its seaward extent at the two hundred meter isobath or "beyond that limit to where the depth of the superadjacent waters admits of the exploitation of the natural resources"

(Convention on the Continental Shelf, April 24, 1958, Art. 1). This definition has been used to fix the limit of national jurisdiction over the resources of the shelf. It is unsatisfactory, however, because its final clause ("beyond that limit to where. . .") makes it essentially open-ended. As technology becomes ever more refined it is possible to exploit resources at ever greater depths; hence, the seaward extent of national jurisdiction over the shelf could creep farther and farther with no clear outer limit except as restricted by the limits of technology. Moreover, some nations possess much more highly-developed technology than others. Are they therefore entitled to broader areas of jurisdiction simply because they have the ability to exploit them? Such problems underscore the need for a new international definition of the continental shelf.

International Agreements

As just this brief discussion indicates, the exercise of jurisdiction on the seas inevitably involves international relations. Unilateral actions like that taken by the United States in extending its fisheries conservation zone tend to be controversial and to necessitate negotiation of many bilateral and multilateral treaties among the nations affected. Enforcement of such agreements also tends to be a problem since, in the past, it has often been left to the government of the ship caught in a violation to prosecute the offender and, obviously, governments tend to favor the interests of their own citizens in such agreements. Moreover, unilateral action does not have the binding

effect of international law, and, in some cases, other nations refuse to recognize the action. Such has been the case with the claims of Peru, Ecuador and Chile to two hundred mile territorial seas. The United States has refused to recognize these claims, and U.S. tuna fishermen have continued to work in these waters -- an activity not usually open in another nation's territorial seas.

Recognizing the international nature of many jurisdictional questions, the nations of the world have attempted since World War II to achieve consensus on diverse maritime concerns, including those of jurisdictional limits. They have had varying degrees of success. A series of United Nations conferences has produced several international agreements in which the U.S. participates. These include the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas, the Convention on the Continental Shelf and the Convention on the Territorial Sea and the Contiguous Zone -- the last two of which have already been mentioned.

The Convention on the High Seas deals with the nature of the ocean -- specifically, those waters beyond the territorial sea. For centuries the high seas were considered free and open for the use of all; nations regarded freedom of the seas as a tenet of international law. The U.N. convention essentially reiterated and codified this principle. It provided that:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised

> under the conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
>
> (1) freedom of navigation;
> (2) freedom of fishing;
> (3) freedom to lay submarine cables and pipelines;
> (4) freedom to fly over the high seas.
>
> These freedoms and others which are recognized by the general principles of international law, shall be exercised by all the States in their exercise of freedom of the high seas.

(Convention on the High Seas, April 29, 1958, Art. 2)

(In this and other international agreements the term "State" refers to an independent nation.)

However, it is important to note that, despite its affirmation of general freedom of the high seas, this definition requires that nations exercise "reasonable regard" for the interests of other countries in their use of the high seas. The inclusion of such a qualification in the convention suggests some international recognition of the fact that unrestricted freedom of the seas can, and has, led to depletion of its resources, particularly fishing stocks. It is a call to nations to limit their individual actions for the good of all and thus is somewhat a call for adjustment of the concept of total freedom of the seas.

The same conference attempted to deal more specifically with the problems of fishery management in the Convention on Fishing and Conservation of the Living Resources of the High Seas. This agreement required states to adopt conservation measures to limit the activities of their nationals in high seas fisheries. If more than one nation worked in a fishery, conservation measures were to be agreed upon through international negotiation and,

failing agreement, through arbitration. New participants in a fishery were to abide by regulations already in force or, in the case of disputes, to request arbitration.

This convention, which was an attempt to at least regulate freedom on the high seas, was never widely accepted (although the U.S. did ratify it) and has proven ineffective. Neither it nor the Convention on the High Seas resulted in effective management of the sea's resources. As a result of their ineffectiveness, many nations, including, as mentioned, the United States, have made unilateral decisions to claim extended fishing zones offshore in order to regulate access to important fisheries.

Two further agreements emerged from the 1958 Geneva Conference: the Convention on the Territorial Sea and Contiguous Zone and the Convention on the Continental Shelf. In addition to defining the extent of the territorial sea, the first of these provided for a contiguous zone of three to twelve miles offshore and assured right of innocent passage and entry in distress within territorial seas. "Innocent passage" refers to navigation through the territorial sea either for the purpose of crossing that sea without entering internal waters or in order to enter or leave internal waters (internal waters are those waters landward of the territorial sea). Such passage may include stopping but only if it is incidental to ordinary navigation or warranted by distress or other extraordinary circumstances. Navigation through these waters may not threaten the peace, order or security of the coastal nation, and foreign fishing vessels

claiming innocent passage are obligated to observe all laws promulgated by the coastal state to prohibit their fishing. Submarines must navigate on the surface and show their flags.

This agreement also provided specific guidelines for determining baselines -- that is, the lines from which the width of maritime zones is measured. Demarcation of baselines is obviously extremely important to the exercise of various types of jurisdiction. The guidelines of this convention do not cover all possible cases but they do provide a basis for negotiation in boundary disputes. The normal baseline used in measuring the width of the territorial sea is the low-water line along the coasts. The irregularity of many coasts, however, makes this means of measurement inadequate in some situations so another standard, the "straight baseline," is applied. The convention provides the following guidelines for the determination of straight baselines:

> Article 6
>
> The outer limit of the territorial seas is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.
>
> Article 7
>
> 2. A bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water marks of

its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water with a line of that length.

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

(Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, Articles 6, 7, 10, 12)

The final convention to emerge from the Geneva conference, the Convention on the Continental Shelf defined the shelf, provided for control of the resources of its seabed and subsoil, and

gave a formula for apportionment of the shelf between opposite and adjacent states:

> Article 6
>
> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

(Convention on the Continental Shelf, April 29, 1958, Article 6)

Despite the emergence of the above agreements, many complex maritime problems remain unresolved, and as nations compete for ever-scarcer resources it has become increasingly apparent that an international framework of some kind for dealing with the living and non-living resources of the sea is necessary. The increase in world population, with its concomitant growth in demand for food, has resulted in overfishing of certain stocks. In addition, as already discussed, developments in mining technology making progressively deeper exploration possible have rendered the Geneva definition of the continental shelf inadequate. Since it is now possible to mine beyond the two hundred meter isobath set by the convention, the extent of national control of

the seabed is undefined.

In recognition of this need for more international cooperation in maritime matters the Third United Nations Conference on the Law of the Sea convened in 1973. During the course of its sessions the conference has considered a broad spectrum of issues. Among these are the nature of the high seas, fisheries management, the existence of zones of extended jurisdiction beyond the territorial sea, preservation of the marine environment, and the possibility of sharing of scientific technology and research responsibilities.

The attitudes of U.N. members toward the law of the sea negotiations reflect, to a large extent, their level of economic development. The highly industrialized nations with their sophisticated technologies desire all possible access to the sea's resources. These are the nations most capable of such ventures as mining of mineral nodules on the deep seabed. These same nations, with their large fleets of ships, also press for freedom of commercial and military navigation. They seek prevention of pollution of the marine environment and freedom of scientific research.

The developing countries, in contrast, have pushed for more coastal state jurisdiction of all kinds within a wide zone. They wish to avoid economic dominance by technologically-advanced nations, so they seek treaty provisions which would permit them to regulate access of all kinds on a national basis. They regard

total control of resources as necessary for the achievement of economic gains. These developing countries wish to place even such areas as scientific research under national jurisdiction. In short, they lean toward gaining as much sovereignty as possible over as large an area as possible. Yet, in those areas where national jurisdiction is not ever likely to be imposed, they have pressed for recognition that the ocean is the common heritage of all mankind and that, as such, its wealth should be allocated among all nations, thus implying some type of administration of international authority to regulate resource use activities on the high seas.

The United States and the other industrialized countries have regarded demands for expanded national jursdiction as detrimental to their military and commercial interests, and they also have been generally reluctant to endorse a view of the ocean's wealth as something to be shared among all nations.

Since the General Assembly of the United Nations functions on a "one nation -- one vote" basis, the views of the developing countries, which are in the majority, have had a strong influence on the Law of the Sea Conference negotiations. However, the views of the industrialized nations -- the major sea powers -- do carry more weight than just their numbers would indicate, since without their participation a Law of the Sea convention would have little value.

The welter of positions maintained by the negotiating coun-

tries has given rise to a complex convention text which attempts to balance the concerns of both advanced and developing nations.[1] The new convention would extend the width of the territorial sea to twelve miles and that of the contiguous zone to twenty-four. In addition it would recognize the right of nations to claim exclusive economic zones from twelve to two hundred miles. In this zone the coastal nation would exercise jurisdiction over the resources of the waters, seabed and subsoil and over any other activities for economic exploration and exploitation. The coastal country would also have jurisdiction over the establishment and use of artificial islands and installations, marine scientific research and the protection of the environment. Within this zone other nations would still retain the rights of navigation and overflight and the freedom to lay submarine cables and pipelines.

The convention also presents a new definition of the continental shelf. According to this definition the continental shelf would legally include the seabed and subsoil of the area underwater extending beyond the territorial sea to the outer edge of the continental margin (the margin includes the submerged extension of the land mass of the coastal nation: the seabed and subsoil of the shelf, the slope and the rise). If the continental margin of a state does not extend two hundred miles beyond the baseline from which the territorial sea is measured, the state could claim jurisdiction to that limit as if it did.

Certain requirements regarding the exploitation of resources

accompany these extensions of national jurisdiction. The convention would require a nation to share with other countries any portion of its allowable catch which the nation itself cannot harvest. The total allowable catch would be determined on the basis of the maximum sustainable yield of a resource -- that is, the level of exploitation which can be maintained from year to year without permanently depleting the resource. We will see how these ideas emerged later on, as international agreement was frustrated, in unilateral declarations by the United States. In those situations in which the same stock occurs within the economic zones of two or more countries the convention would require the nations to negotiate agreements for the management of this stock. Similar negotiation would be required for management of highly migratory species such as tuna. The convention would assign responsibility for beneficial regulation of anadromous species to the nation in whose stream the stock originates. It would also restrict fishing for these species to waters landwards of the outer edge of the economic zone except where such a restriction would cause economic dislocation in another country. In such cases the countries involved would negotiate the terms for continued access of the non-coastal country to the stock.

The Law of the Sea draft treaty deals with the resources of the continental shelf slightly differently. Within the two hundred mile limit a nation would have exclusive rights to these resources, but those countries whose shelves extend beyond two hundred miles would be required to contribute a percentage of

their profits from any exploitation carried on beyond the two hundred miles. They would make this contribution to the International Seabed Authority. This organization, established by the treaty, would distribute the funds among parties to the agreement, paying particular attention to the needs of developing nations.

The International Seabed Authority would also have broad powers to coordinate the sharing of marine research and the transfer of marine technology, especially in regard to exploitation of the deep seabed (the seabed beyond the continental margin). Such exploitation, primarily the extraction of minerals, only indirectly concerns the conduct of the fishing industry since few, if any, commercially attractive stocks are sought beyond two hundred miles. However, these provisions of the treaty are probably the most troublesome for U.S. interests. Those corporations which would be involved in such mining regard the provisions for the sharing of technology with suspicion and oppose the treaty. On the other hand, the U.S. military establishment regards the U.N. treaty as the best possible solution to the problem of "creeping jurisdiction." Establishment of the clearly-defined economic zones would forestall the claiming of ever-wider territorial seas within which the passage of U.S. military vessels would be circumscribed. It is impossible to say, at this writing, when or if this United Nations treaty will be accepted by the United States and the other participating nations. If it is ratified its provisions will supercede those

of the previously-discussed 1958 Geneva conventions.

Relevant Treaties

In the absence of a U.S.-ratified United Nations treaty, the United States will continue to claim the three, twelve and two hundred mile limits as they have been described earlier. In regard to the foreign relations of the U.S. the two hundred mile limit in particular has necessitated the negotiation of many treaties with those nations which have traditionally fished in waters off the U.S. coasts. In the North Pacific these include Japan, Poland, Taiwan, the Soviet Union, Canada and Korea. Under the provisions of these treaties, most of which went into effect in 1977, foreign fishing within two hundred miles of the U.S. coast is totally regulated by the U.S. government. By signing the treaties the nations involved recognized the U.S. claim to the exclusive fishing zone and, in return, the United States agreed to provide a measure of continued access to fisheries to those nations which have traditionally fished these waters. Many of the treaties require the presence of U.S. observers on board the foreign vessels to ensure compliance with the regulations, and they also provide for U.S. prosecution of offenses. Periodic renegotiation of the treaties is necessary; most also contain a provision for renegotiation upon the emergence of an agreement from the Law of the Sea Conference.

The Nature of International Law

The mere emergence of a Law of the Sea Treaty from the Third U.N. conference would not automatically ensure its acceptance as

international law. For it to achieve this status, it would be necessary for an adequate number of nations to accept and implement its provisions. This may seem a self-evident statement, but within it lies the crux of international law: it exists and functions only by consensus. Such consensus can be achieved in two ways -- through the negotiation of treaties or through the force of custom. Treaties, of course, impose an obligation on the parties to the agreement to fulfill their terms. Custom becomes a source of international law when a sufficient number of nations engage in a practice over a long enough period of time for its legitimacy to be recognized by a majority of the nations of the world. Such, until recently, was the case of the three mile limit to the territorial sea. Most nations had long regarded this boundary as the seaward limit of sovereignty and it was thus accepted as a tenet of international law. In recent decades, however, this practice has been challenged by nations attempting to change the nature of maritime limits and so to forge new international law. Nevertheless, until now no one new practice has become so widespread as to elicit the acquiescence of most countries. As a result, many countries, including the United States, still claim territorial seas of only three miles and still cite customary international law in support of such limitations, while other nations press for extension of the width of the sea through international agreement or disregard custom and unilaterally claim wider seas.

Enforcement of international law, even in its least disputed

aspects, tends to depend on the good will of the nations involved. International tribunals such as the International Court of Justice also function only through consensus; that is, such a tribunal has no power to enforce its decisions. It can essentially only render opinions, which may or may not be accepted by the nations involved in the dispute; compliance is voluntary.

Despite their limitations, such tribunals do serve a purpose: they provide a forum for the airing of international disputes. In such a forum disputes can be submitted to impartial scrutiny and legal guidelines for settlement at least suggested. Moreover, the opinion of an international court has some weight in the future development of international law; its decisions can be cited by a nation seeking a legal basis or justification for an action.

As noted above, the treaty emerging from the Law of the Sea Conference will not have the effect of international law until a sufficient number of nations ratify and implement it. For this particular treaty to function effectively, moreover, it seems necessary that the developed nations of the world, including the United States, participate. Lacking the participation of the United States and other major sea powers the agreement would probably be worthless. It is not yet clear, however, whether the U.S. Senate will ratify this agremeent, and without the acceptance of the Senate the treaty will have no status under U.S. law despite the fact that U.S. negotiators have been involved in its

drafting.

The Senate derives the power to ratify treaties from Article II, Section 2 of the United States Constitution:

> [The President] shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . .

This federal treaty-making power is superior to state powers; that is, the individual states cannot enact legislation which conflicts with treaties approved by the Senate, and the states are bound by the provisions of national treaties.

Admiralty Jurisdiction

In considering issues of jurisdiction involved in fisheries law it is important to discuss briefly at the outset the specialized area of maritime law. Briefly, maritime, or admiralty, law is that body of rules, concepts and practices which governs the concerns of carrying passengers and goods over water. This sphere of law actually developed as one aspect of customary international law, and even now in the U.S. most maritime law has no specific statutory basis; it still derives from international law.

Shipping has from its beginnings been an international activity, and the body of law which arose concerning the conduct of affairs on water reflects this international nature. The rules and practices accepted as binding are based on customs practiced by all nations for centuries. Admiralty law, which predates the rise of the national state, was first codified by medieval tribu-

nals in the port cities of the Mediterranean. These tribunals arose to deal specifically with maritime concerns, and the body of law which they administered and to which they first gave written expression was already well established by customary practice. It had not been established by national statute; indeed, national governments as they are now known did not then exist. The codes of some of these medieval tribunals are still occasionally referred to today in admiralty courts.

As England developed as a maritime power, separate maritime tribunals also sat in English port towns, and, eventually a specialized admiralty court system evolved which could also deal with civil concerns of a maritime nature, the damage of goods in shipment and matters such as this. Similar admiralty courts also sat in the British North American colonies. Hence, at the time of the American revolution the separate nature of maritime legal concerns was already well established by custom on this continent.

The U.S. Constitution gives jurisdiction over admiralty matters to the federal government:

> The judicial power [of the United States] shall extend to all cases of admiralty and maritime jurisdiction.

(U.S. Constitution Article III, Section 2)

The physical dimensions of this jurisdiction are generally:

> all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state.[2]

This grant of jurisdiction to the federal government has been interpreted broadly, and on the occasions when legislation on maritime concerns has been necessary, the federal government has invoked this grant of authority as justification for its action. The power of the federal government over maritime concerns, however, does not totally exclude the individual states from both legislating and asserting judicial jurisdiction over certain topics.

The state-federal "tension" in this area is merely one aspect of the state-federal conflict inherent in the entire federal system. A welter of state legislation on maritime matters does exist, and it is invalid only where it conflicts with accepted admiralty law or with federal statutes. State legislation may supplement federal legislation, and the state may also regulate matters of purely local concern in which no conflict with federal authority is involved.

Cases falling within the admiralty jurisdiction are tried in federal courts on the admiralty "side" where different procedures and terminology are used. In general, cases within this jurisdiction are tried by a judge, sitting without a jury, although there are exceptions to this rule. In criminal cases trial is by jury and the cases proceed as under common law. Moreover, despite the grant of general jurisdiction to the federal government, some maritime cases can also be brought in state courts. This further complication of the federal-state conflict is the result of a clause in the Judiciary Act of 1789. This act reaf-

firmed the basic constitutional grant of admiralty jurisdiction to the federal judicial system, but it also saved "to suitors, in all cases, the right of a common law remedy where common law is competent to give it" (1 Stat 76-77). As a consequence of this exception, certain types of maritime claims may be brought as ordinary civil actions in state courts or in federal courts on the civil "side." However, even in these cases customary federal maritime law aplies rather than state law.

Law of the Flag

Yet another aspect of jurisdiction warranting mention at the beginning of a course on fisheries law is the "law of the flag." This legal concept reflects both the international character of navigation and the traditional concept of freedom of the seas. It has long been accepted practice that the actions of a vessel and its crew are subject to the law of its flag, that is, the law of the country in which the ship is registered. The country of registry is responsible for prosecuting any offenses committed on the high seas. However, for those offenses committed within another nation's territorial waters the question of jurisdiction is more complicated. The law of the flag may sometimes apply even in these waters, but this is much less certain than is the case for offenses committed beyond the territorial limit of any nation. The question of whether the law of the flag is applicable in territorial seas depends upon the nature of the offense or claim, the nationalities of the persons or vessels involved, and the possible existence of treaties between the nations

involved.

The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides some guidance to the authority of the coastal nation with respect to foreign vessels in its territorial waters. A nation may exercise criminal jurisdiction on a vessel passing through its territorial sea if --

1. the consequences of the crime extend to the coastal nation;

2. the crime disturbs the peace or order of the nation or its territorial sea;

3. it is necessary to suppress traffic in drugs; or

4. the master of the ship or the consul of the flag state requests the assistance of the local authorities.

These conditions do not apply if the foreign vessel is passing through the territorial sea after leaving the internal waters of the coastal nation. If a country does exercise its criminal jurisdiction on a foreign vessel, the captain may request the authorities to notify the proper consular official of the flag state.

A coastal nation may not stop a foreign vessel in its territorial sea to exercise civil jurisdiction against a person on the vessel unless it is leaving the internal waters of the country. Also, a nation may not take civil proceedings against a foreign ship passing through its territorial sea except with respect to liabilities or obligations assumed by the ship during or, for the purpose of, its passage through the waters of the country.

The proposed U.N. Law of the Sea treaty would leave these

provisions for coastal state jurisdiction on foreign vessels essentially unchanged.

State Jurisdiction

The State of Alaska has jurisdiction over the fisheries of its internal waters and within its territorial sea (that is, extending three miles beyond its coasts). It exercises this jurisdiction through a complex system of regulations which govern the types of gear used in fishing, the time in which fishing is permitted, the geographic location where fishing is permitted and the harvestable size of certain species. Since 1974 the state has used its authority to issue licenses to restrict the total quantity of gear used in certain fisheries.

When we say that the state has jurisdiction over fishing, we do not imply that the state "owns" the fish. The very notion of ownershp is a legal question which takes on special characteristics when applied to fish. Like game, fish are ferae naturae, wild beasts, and as such they "belong" to no one. Legal ownership depends upon submitting the species to possession. Freely swimming, the fish belongs to no one, but once caught, it belongs, legally, to the person who catches it. Jurisdiction, in this sense, is not ownership, but rather control. Without owning the fish, the state does have the authority to regulate and control the resource.

Beyond the territorial sea, individual states of the U.S. have been able to exercise a limited degree of authority over

fishing activities through two legal devices through which they express their legitimate interest in a fishery.

The first of these devices is the landing law which directly regulates the disposition and/or transportation of fish within the states' territorial waters or onshore. Such laws are effective because they deny the fisherman access to necessary onshore facilities. In a U.S. Supreme Court decision in 1936 (Bayside Fish Flour v. Gentry) the Court upheld a California law which regulated the disposition of sardines landed within the state regardless of the area in which the fish were caught. The Court based its decision upon the fact that the landing law was motivated by a legitimate interest of the state in conservation of the resource, and noted that its law did not conflict with any federal law.

The State of Alaska has similar laws:

> It is unlawful to transport through the Pacific Ocean waters of the state, or to have possession in this state, any salmon taken by any type of net or longline in international waters of the Pacific Ocean or within the territorial waters of this state or of another state or country where fishing for salmon with nets or longline is unlawful.

(5 AAC 36.030)

Under customary international law, states may directly regulate the fishing activities of their own citizens as an exercise of the states' flag state authority. In the late 1930's the state of Florida, for instance, convicted one of its citizens of using sponge fishing equipment prohibited by state law. The

defendant appealed the decision to the U.S. Supreme Court (Skiriotes v. Florida, 1941), contending that the fishing activity took place beyond the area of state jurisdiction. In upholding the Florida court's decision, the Supreme Court noted:

> If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.

A number of state court decisions since then have extended this authority to include certain non-residents of the state. In State v. Bundrant (1976), the Alaska Supreme Court held that the state's regulation applied to non-residents fishing on the high seas because the non-resident fishermen were licensed by the state and depended upon a "daily use of Alaskan territorial waters and facilities."

Thus, as summarized in State v. Bundrant, the state's extra-territorial authority over fishing activities rests upon (1) a legitimate state interest in the conservation of the resource regulated, (2) the lack of conflict between state laws and federal laws, and (3) a sufficient nexus between the fishing activities and the state or facilities within the state (i.e., licensing, purchasing fuel and supplies, use of processing facilities).

Since the enactment of the Fisheries Conservation and Management Act (1976), the state of Alaska exerts an additional degree of influence over fishing beyond its territorial sea

through the participation of its representatives in the North Pacific Fisheries Management Council, but more will be said on this later.

The notion that individual states, rather than the federal government, have jurisdiction over their fishery resources (including police powers) is traditional in American law. The U.S. Constitution says nothing about fish, and since the days of the founding fathers the states have presumed their authority in this area. State jurisdiction is implied in the Alaska Statehood Act (1958) which directs the U.S. Department of Interior to transfer the authority to regulate the fisheries of Alaska to the State Department of Fish and Game. State jurisdiction is also implied in the Submerged Lands Act (1953), which extends this jurisdiction to include ownership of the land and mineral resources beneath the territorial sea.

State jurisdiction, however, must always yield to federal power by reason of the "supremacy clause" of the U.S. Constitution which says there are three areas in which powers granted to the federal government may take precedent over the states' authority to regulate their fisheries. The U.S. Constitution gives the President the power to enter treaties with foreign nations with the advice and consent of the Senate. Since many of these treaties deal with such things as the protection of species which migrate from one nation to another or upon the high seas, the states' authority to regulate these species is limited.

The Commerce Clause of the U.S. Constitution provides that Congress "shall have power. . . to regulate commerce with foreign nations and among the several states and with the Indian tribes." In a number of cases beginning in the early years of this century, the courts have decided that the Commerce Clause grants the federal government also police powers in this area. Since fishing activities frequently involve the transport of fish from one state to another or to foreign nations, the federal government has jurisdiction over these activities.

The third area in which the states' jurisdiction is limited concerns the right (or lack of right) of states to deny access to their resources to U.S. citizens of other states. Though applications of this principle is still subject to interpretation in close cases, its constitutional foundation rests in Article IV which asserts that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." Shortly after the U.S. Civil War this Article was strengthened by the so-called Equal Protection clause, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws" (14th Amendment, 1868).

Statehood is a rather recent phenomenon in Alaska. Indeed, the proponents of statehood argued that gaining local control of

the fisheries was one of the primary reasons for seeking admission to the Union. But since the federal government did have jurisdiction for such a long period of time, it is worthwhile to examine federal law concerning Alaska's fisheries from an historical perspective.[3]

History of Fisheries Law in Alaska

Although Native Alaskans have harvested the state's fishery resources for their subsistence needs since time immemorial, it was not fish, but marine mammals, which attracted the first commercial interest in Alaska. Whaling boats from New England and California began activity in the North Pacific and Arctic Oceans early in the 19th Century. When the U.S. purchased Alaska from Russia in 1867 it acquired a thriving trade in seal and sea otter pelts that had been established by early Russian settlers. The taking of whales and walrus went unregulated until after stocks had already been depleted to the extent that it was no longer an economically viable activity, but the U.S. Congress demonstrated an early interest in the fur seal business.

In 1870, three years after the purchase of Alaska, Congress enacted legislation creating a federal reservation in the Pribilof Island seal rookeries. The reservation status did not make the taking of seals illegal in the rookery. Instead it provided for a 20-year exclusive concession of the resource to a private firm. The federal treasury was to receive a royalty for each skin as well as a fixed annual rental fee. As a token conservation measure, Congress established an annual quota of

100,000 skins. The successful bidder for the lease was a San Francisco firm organized under the name of the Alaska Commercial Company.

When the first 20-year lease period expired in 1889 Congress enacted new legislation extending it for another 20-year period, and the lease was awarded to another San Francisco firm, the North American Commercial Company. By then, however, the herd had been reduced greatly in size, so rather than specify a quota Congress charged the Secretary of the Treasury with establishing the annual quota on a year to year basis.

Whatever intentions Congress may have had regarding conservation, the measures adopted were certainly not effective in preventing the depletion of the stocks. Besides the fact that the initial quota of 100,000 skins was far too high for the fishery to sustain on an annual basis, pelagic sealing (that is, the taking of seals on the high seas) was taking its toll on the seal population.

The 1870 law contained a provision prohibiting pelagic sealing but this provision was largely ignored in the early years of the lease period. In 1886, at the request of the lessor, the Treasury Department began enforcing the ban on pelagic sealing and under provisions specified in the Act seized a group of offending vessels. Because a number of the vessels seized were of British and Canadian registry, there followed immediately an international incident. The vessels were taken to Sitka where

their captains were tried in U.S. District Court. In the trial the U.S. argued that since the seals originated in the U.S. and bred in the Pribilof Islands they were American "property" and subject to U.S. control. The defense, as would be expected, cited International Law and "freedom of the seas" in defending their right to take seals in an unregulated manner.

The Court ruled in favor of the U.S. and ordered forfeiture of the vessels and their catch, but the matter did not end there. After a fruitless exchange of diplomatic notes, the parties agreed to submit the dispute to a special international tribunal formed in Paris. In the context of international law prevailing at the time, the U.S. contention of "ownership" was pure nonsense. On this basis, the tribunal ruled in favor of the British and ordered the vessels returned and an indemnity paid. The tribunal also established a modus vivendi whereby the disputants agreed to a prohibition of pelagic sealing within 60 miles of the Pribilofs, and a total ban during certain times of the year.

Even this internationally agreed-upon prohibition was not enforced, and by the end of the second 20-year lease period the herd was depleted to the extent that Congress decided not to renew the lease. Instead it directed the Secretary of Commerce to take over the business and begin rebuilding the stocks. In 1911 an international treaty banned all pelagic sealing, and today the seals are protected by the Marine Mammal Protection Act (1972).

The fur seal trade was already in existence when the U.S. purchased Alaska from Russia. Commercial interest in the Territory's other fishery resources developed largely after U.S. acquisition. Consequently the first legislation concerning fishing came much later. It was not until 1889, 22 years after the purchase of the Territory, that Congress enacted the first legislation regulating Alaska's salmon fisheries. At that time there were 37 canneries operating in Alaska. The legislation was directed at conservation of the resources; it made it unlawful to place barricades in salmon spawning streams. The Act reflected only the intent of Congress, as no appropriations were made for enforcement.

In 1896 Congress upgraded this legislation following an unfavorable report of an Assistant Secretary of the Treasury based upon an inspection he conducted of the fisheries in 1894. The new Act forbade fishing in smaller spawning streams and placed restrictions on fishing in larger streams and rivers (more than 500 feet in width). It also provided for a two-day closed period each week and empowered the Secretary of the Treasury to close temporarily or permanently any stream if he deemed it necessary for the preservation of the stocks. With this Act Congress had thus addressed three of the variables currently used to regulate the fisheries: the type of gear, the location of fishing and the time of fishing.

In its enforcement provisions the 1896 Act provided funds for one inspector and two assistants. Throughout the entire period

of federal jurisdiction, fisheries legislation was consistently weak in its enforcement provisions. The Congress repeatedly demonstrated that it did not appreciate the geographic extent of Alaska's fisheries. Three inspectors were hardly adequate to police a fishery which by then extended from Southeast Alaska to the Bering Sea, especially since Congress neglected to provide its inspectors with a boat. In order to carry out their enforcement responsibilities the inspectors were forced to depend on the canneries, which provided transportation when and where they chose to do so.

In 1900 the Treasury Department adopted a regulation requiring canneries to operate hatcheries. The regulation was ignored by the canneries except those which already had hatcheries, so in 1906 Congress sought to provide an incentive by enacting a tax on canned salmon and exempting from the tax those canneries which operated hatcheries. The legislation also prohibited the use of fish traps in smaller streams or within 500 yards of the mouth of smaller red salmon streams, thus continuing the trend established in earlier legislation of moving commercial fishermen away from fresh water.

Two legal events of significance to Alaska's fisheries occurred in 1924. The first was the formulation of the International Convention on the North Pacific Halibut Fishery, which added an international dimension to jurisdiction in this fishery. The second event was the passage by Congress of the White Act.

The first two decades of the 20th Century represented a period of tremendous growth in the Alaska salmon industry, followed by a swift decline in the years 1921-1922. By then, even industry representatives who had previously refused to admit that stocks were being depleted agreed that strict conservation measures were urgently needed.

Congress responded to this need with the enactment of the White Act (named for Representative Wallace White of Maine). The White Act represented a new approach in fisheries law. In its previous legislation Congress had addressed specific questions such as the use of barricades and the location of fishing. With the White Act Congress simply declared its intent that there be escapement of not less than 50% in Alaska's salmon fisheries. The formulation of the regulations necessary to achieve this goal was left to the Secretary of Commerce.

The question of fish traps deserves special attention. Their use in Alaska's salmon fisheries became a volatile and highly emotional issue during the decades preceding statehood. In fact, opponents of fish traps viewed their abolition as a principle motive for entering the Union. In the minds of many Alaskan fishermen, fish traps were the primary cause of the depletion of the Territory's salmon fisheries. Apart from the question of overfishing, opponents of the use of fish traps objected to the fact that the traps tended to give a monopoly or exclusive use of the area of their location in the fishery to the traps' owners. The War Department, with an interest in preventing obstructions

to navigation, had the authority to issue permits for the use of traps. Until almost the beginning of World War II this Department followed the practice of issuing only one permit per site, which had the effect of granting "property rights" to that portion of the fishery to the owner of the trap. The disputants divided along the lines of resident Alaskans versus "outside" intrests in the industry because the latter owned an overwhelming majority of the traps; of the 434 fish traps in operation in 1944, 396 (91%) were owned by non-residents of Alaska. Just eight packing concerns owned 245 (56%) of the traps.[4]

Since the 1920's, Alaska's Territorial Legislature had repeatedly recommended that fish traps be abolished. Their status however was only advisory, and the authorities of the federal government consistently rejected the legislature's recommendation. In 1948 the legislature sought to give more weight to their recommendation by adding the voice of the people of Alaska. In a referendum that year the citizens of the Territory voted to abolish fish traps by a margin of 19,712 to 1,624. Following the referendum Congress held hearings on the issue in Washington, D.C. and in Alaska. No legislation followed the hearings, but the testimony of Cordova fisherman H.J. Lannen illustrates the intensity of the feelings of Alaskans on the subject. Lannen testified that there were only two alternatives: "Either remove the traps from Alaska and turn it over to her people, or I would say remove the people from Alaska and turn it over to the traps. I do not believe there is any middle ground."[5]

The issue of fish traps was settled with statehood. The authors of the state constitution felt strongly enough about the subject to append an ordinance to the constitution making the use of fish traps unlawful. Approved by the electorate, the ordinance took effect with statehood and the adoption of the state constitution.

Statehood

With statehood jurisdiction over Alaska's fisheries passed from the federal government (by then, the Department of Interior) to the State Department of Fish and Game. In 1949 the legislature had established a Territorial Department of Fisheries to act as a shadow agency to the U.S. Bureau of Fish and Wildlife and to provide support to the federal government in the areas of research and enforcement. Thus the mechanism for regulating the fisheries was already in place when Alaska became a state in 1959. Since then enforcement powers have passed to the a Division of Fish and Wildlife Protection created in the Department of Public Safety.

In general, fisheries law since statehood has become more complex and more extensive as the areas of jurisdiction have expanded to include species and geographic locations and biological and economic issues not addressed in any federal legislation. The most significant change in law occurred in 1973, when the state enacted legislation establishing a system for limiting entry to fisheries.

We will say more on limited entry later. For now it is sufficient to note that the impetus behind the legislation is both economic and biological in nature. Given the goal of maintaining the maximum sustainable yield in a fishery, it stands to reason that until we learn to successfully fertilize the seas, the allowable catch is going to remain more or less constant. In focusing on limiting the total catch, fisheries law as it had developed in Alaska and elsewhere prior to limited entry, often had the peculiar characteristic of legislating inefficiency upon the industry -- making it more difficult to catch fish. Creative fishermen devise better techniques and advancing technology provides them with improved tools such as electronic fish finding devices. In order to prevent overfishing, regulators have frequently found themselves forced to prohibit or hedge against these improvements in the fisherman's productivity as quickly as they are introduced.

Pressure is placed on the fishery also by increases in the fishing population. In an open access resource the unemployed individual with gear and a nominal licensing fee has everything to gain by entering the fishery. But since the total catch is fixed each new entry distributes a loss among those already involved in the fishing effort. As the fishing population increases each individual fisherman's potential share of the total catch is reduced. Conceivably it could be reduced to the extent that the fisherman's earnings from his effort are insufficient to support himself and his family. Limited entry seeks

to prevent this by assuring that the total quantity of gear (and hence the total number of fishermen) operating in a fishery is such that each fisherman has the potential of earning a decent living in the enterprise. The issue is of course more complex than this, especially since the entry permits have become a valuable and marketable commodity, but we will say more on this subject later.

Prior to statehood the competitors in Alaska's fisheries divided along the lines of resident Alaskans versus U.S. citizens of other states. The competition between the two groups is reflected to a certain extent in fisheries law, such as the limitation of salmon seine vessels to a length of 50 feet (AS 16.05.835). The limitation has nothing to do with the efficiency of the vessels in catching fish; rather it serves to keep the larger seine vessels based in Puget Sound out of Alaska's salmon fisheries. The legislation has also had an effect on vessel design as marine architects devise ways of packing 70 feet of gear and equipment on a 50 foot vessel.[6]

Since statehood the protagonists in the fisheries of Alaska to an increasing degree have been U.S. fishermen and foreign fishermen operating in waters off the state. For this reason it is appropriate to direct our attention now to the Fisheries Conservation Management Act (1976) and the federal legislation regarding foreign fishing which preceded it.

Federal Jurisdiction

Foreign Fishing

International Maritime Law and the concept of the three-mile territorial sea have been developed and accepted to the extent that any activity other than innocent passage by foreign vessels within the territorial sea of another nation is prohibited by implication. Any access to operations in another nation's territorial waters must be negotiated by treaty. But for many years there was no federal legislation addressing specifically the question of foreign fishing within American waters. Since jurisdiction in this area belonged to the individual states, states could and some did, enact legislation prescribing sanctions. But these sanctions lacked the force and prestige of national policy, and in the 1950's U.S. fishermen began to experience increasing competition from large, sophisticated distant-water fishing fleets operating just beyond the U.S. territorial sea and occasionally straying within it. In 1962 the U.S. Coast Guard initiated a general policy of boarding and inspecting all foreign vessels found within U.S. waters, not in innocent passage. But the Coast Guard had no authority to do anything to persons found in violation of U.S. fisheries law other than to escort the offending vessel out of the territorial sea.

With intrusions of foreign vessels into U.S. waters becoming more and more frequent, the Congress responded in 1964 with the enactment of a law addressed explicitly to the question of foreign fishing within the U.S. territorial sea. Known as the

Bartlett Act, after Alaska's Senator E.L Bartlett, the legislation was not intended to preempt the state's powers against trespassers of their seas, but rather to supplement the laws of the states with a comprehensive federal law and the enforcement capabilities of the U.S. Coast Guard.

Specifically, the Bartlett Act made foreign fishing in the U.S. territorial sea a federal offense. It provided for penalties of fines (up to $10,000), imprisonment (up to one year), and forfeiture of vesels, cargo and gear. In a 1970 Amendment Congress dramatically strengthened these penalties: increasing the maximum fine to $100,000, and providing for the payment of informers. Exceptions to this general prohibition were permitted when provided for by an international treaty. In addition, the Secretary of Treasury could grant exceptions, with the concurrence of the Secretaries of State, Interior, and the authorized officials of the individual state, if the exceptions were judged to be in the national interest. The Act gave enforcement powers to the U.S. Coast Guard and to designated officers of the states.

In essence, the Bartlett Act established a policy of effective joint federal-state jurisdiction with respect to foreign fishing within U.S. waters. The law authorized the U.S. District Courts to issue warrants, but it empowered enforcement officers to board and search any vessel with or without a warrant, and to arrest offenders and seize vessels, cargo and gear if there was "reasonable cause" to believe that a violation had occurred.

As we have seen in our discussions of the International Law of the Sea, competition among nations for the earth's natural resources has in recent decades resulted in a general trend towards the extension of national zones of jurisdiction. In the Bartlett Act the U.S. prohibition of foreign fishing claimed jurisdiction beyond the territorial sea for "Continental Shelf fishery resources," though without specifying the geographic or biological extent of these resources. In 1966 Congress extended the U.S. claim of jurisdiction to include all fishery resources within a contiguous zone extending nine miles beyond the territorial sea (Public Law 89-658). This zone, it is important to note, was construed by th Act only as a fisheries zone. The Act claimed no extended jurisdiction in such areas as navigation, mineral exploration, etc. (though some of these areas were covered by international treaties). Foreign fishing within the zone was not entirely prohibited, as the Act conditioned the U.S. claim to exclusive fishery rights, "subject to the continuation of traditional fishing by foreign states within the zone as may be recognized by the United States." The contiguous zone created by the Act was an area of federal jurisdiction, as the legislation was explicit in clarifying that it did not constitute an extension of the jurisdiction of the states beyond their territorial seas.

In the context of the prevailing international environment, the 1966 Act represents a rather modest claim to extended jurisdiction. By the time of its enactment a number of nations had

claimed much more extensive zones, up to 200 miles in some cases, and including jurisdiction over additional resources besides those of the fisheries within the zones. The United States opposed such claims and was at best a reluctant follower of the general international trend towards expanded national jurisdiction. U.S. mining interests and the military had doubts about the implications of such claims in areas other than fishing. And although the U.S. fishing fleet did not operate extensively in the waters of other nations, the U.S. tuna fleet harvested a significant portion of its catch of this highly migratory species within 200 miles of the coast of other nations, especially in South American waters.

Consequently, when Chile, Ecuador and Peru, with a joint agreement in 1952, claimed an exclusive natural resource zone extending 200 miles from their coasts, the U.S. Congress enacted legislation designed to encourage U.S. Fishermen to ignore the claim. With the Fisherman's Protection Act (1952), the federal government agreed to pay any fines incurred by U.S. fishermen for violating the 200 mile claim of Chile, Ecuador and Peru. The U.S. government was to recuperate funds expended for these fines by deducting an equal amount from any foreign aid these nations were scheduled to receive from the U.S. Treasury. But the Act gave the President the authority to waive this deduction, which he has usually done.

Again in 1970, when Brazil claimed a 200 mile exclusive economic zone, the U.S. responded by negotiating an exception for

its own shrimp fishermen who had traditionally fished off the coast of that nation. In a treaty with Brazil the U.S. in effect agreed to buy fishing rights in the zone for a restricted number of U.S. fishermen.

By the early 1970's it was clear that the International Law of the Sea Conference was going to result in the creation of some form of 200 mile exclusive economic zone for coastal states. After initial opposition, the U.S. contingent to the Conference reluctantly supported this concept. Moreover, as large and well-equipped foreign fishing fleets increased their effort off the coasts of America, U.S. fishermen were finding it more and more difficult to compete. Stocks within the territorial sea and contiguous zone were being depleted, especially stocks of anadromous species which breed in fresh water and migrate on the high seas. Foreign fishermen were intercepting these species before they returned to the zone of U.S. jurisdiction (the twelve-mile limit).

By 1975, thirteen nations had claimed some form of exclusive zone extending 200 miles from their coasts. In 1976 Congress modified the U.S. claim of jurisdiction with the enactment of the Fisheries Conservation and Management Act (FCMA, which took effect in March, 1977).

We will examine the FCMA in greater detail at a later point in our discussion, but two aspects of the Act deserve mention here, as they bear directly on the general question of jurisdic-

tion. First, the 200-mile zone created by the Act is only an exclusive fisheries zone. The U.S. makes no claim of extended jurisdiction over other resources within the zone. Second, the Act extends the area of federal jurisdiction over fisheries to include the area lying between three and 200 miles off the U.S. coast. Technically, the area within the territorial sea (three-mile limit) remains a zone of jurisdiction proper to the individual states with regard to fisheries. But the provisions of the FCMA concerning management of the fisheries and foreign fishing within the zone are certain to have implications on state management plans and perhaps further limitations on state jurisdiction.

The FCMA created regional fisheries management councils charged with formulating management plans for the zone, and establishing both the optimum sustainable yield and the portion of that yield which will be allocated to foreign fishermen. It is conceivable that these management plans could conflict with those of individual states for the fisheries within their territorial seas; what little litigation there has been concerning the Act has addressed this question. Congress sought to minimize potential conflict in this area by assuring the participation of state officials in the regional councils. For instance, of the eleven voting members forming the North Pacific Fisheries Management Council, which has responsibility for fisheries in the zone located off Alaska, five are appointed by the Governor of Alaska. A sixth member is the State Commissioner of Fisheries.

In its provisions for foreign fishing within the zone, the FCMA establishes a system of priorities and directs the Executive Branch of the federal government to negotiate international treaties and agreements with nations whose fishermen operate in the zone. The priorities concern whether or not the foreign fishermen have traditionally fished in the zone, and whether or not U.S. fishermen will be able to harvest the entire optimum sustainable yield. These provisions will inevitably lead to a proliferation of international treaties and agreements which will take precedent over state jurisdiction and may limit the authority of states within their territorial seas. But as the FCMA is still new legislation, and the federal government is still in the process of implementing its provisions, the full effect of the law on the question of state jurisdiction is a subject for future discussion.

Other Interests

Men first exploited the sea for its fishery resources and potential for navigation. Neither activity is inherently detrimental to the other, so except for possible overcrowding, they were able to coexist in harmony. Among the earliest regulations in Alaska's fisheries were those establishing minimum distances between the gear of competing fishermen. Today, as we all know, the demands on the sea are more diverse, and they are growing rapidly. To increasingly greater seaward distances, the ocean has become the scene of research activities, continental shelf exploitation, oil and mineral exploration and deep seabed mining.

Overcrowding in the fisheries has become a real and present problem as these interests compete for the resources of the sea and the land beneath it. Moreover, the risks of injury that these competing activities pose for each other, as for example, fishing vessels are forced to thread their way through oil rigs, or tankers are running over crab pots, are rising.

It is difficult to discern whether it preceded or followed fishing and navigation, but the third traditional use of the sea has most certainly been dumping. And besides the actual dumping of wastes directly into the fishery, the fisherman has an interest in a host of onshore activities that ultimately have a detrimental effect on his fishing success. Pollution from industrial and urban activities, the use of pesticides, and population increases all have repercussions on the health of the fishery. Anadromous species present special problems since the fish spend the most fragile periods of their life cycle, spawning and hatching, in fresh water estuaries distant from the fishery. Hydroelectric projects impede their migration to the spawning grounds; in Southeastern Alaska there is a real conflict between upland logging operations and the fisherman. Clear-cutting may increase stream temperature, siltation, and erosion with a potential detrimental effect on salmon spawning activities. Even such seemingly innocuous activity as children skipping rocks in a salmon spawning area (prohibited by AS 16.10.010) is going to have an effect on the fisherman's future catch.

Faced with these competing interests, governments have been

forced to reassess the extent of their national jurisdiction, and to actively interest themselves in the character of the regime in the areas of international jurisdiction. Moreover, within the areas of their own jurisdiction, nations have had to establish priorities that govern the conflicts between diverse activities in the national interest.

Governments express these priorities in legislation, often designed to foster or protect one activity or one segment of the population from the detrimental effects of another activity. The multitude of legislation is as diverse and complex as society as a whole, and since within our national and state systems we define jurisdiction topically as well as geographically, the result is a number of different state and federal agencies all present at the same time in the fishery, each with the responsibility for implementing or the jurisdiction for enforcing some aspect of the legislation governing the activity in that fishery.

For example, at the state level of jurisdiction alone, in a typical day in an active fishery, we may see officials from the Department of Commerce and Economic Development administering commercial fishing loans, enforcement officers from the Department of Environmental Conservation inspecting the sanitation processes in the canneries, biologists from the Department of Fish and Game conducting research and enforcement officers of the Department of Public Safety monitoring the activities of the fishermen. The Department of Labor will be there to settle disputes involving the occupational safety or hiring practices of

the fishermen and cannery workers. Onshore, the Department of Natural Resources may be regulating logging activities, and it may well be also offshore with the oil drilling rigs. The Department of Transportation will be supervising the construction in the harbor, and the Department of Revenue will be there to collect the state's taxes.

These state officials will all have counterparts in the areas of federal jurisdiction. So the number of regulators and enforcement officials will be as great as that of the diverse interests of the citizens with an interest in the fishery and its resources, and the total picture will be complex indeed.

In the following chapters we will discuss the legislation, federal and state, justifying the presence of these officials in the fishery. We will examine the agencies involved in the implementation and enforcement of fisheries law to determine their role in safeguarding the overall health of the fishery.

[1] The treaty text used in this analysis of the Third U.N. Conference on the Law of the Sea is the "Draft Convention on the Law of the Sea," published in September, 1980 following the ninth session of the conference. As of this writing a final treaty text has not yet been published, but it is not expected that the provisions of the treaty dealing with maritime zones and fishing will change substantially.

[2] Grant Gilmore and Charles L. Black, Jr. The Law of Admiralty (Brooklyn: The Foundation Press, Inc., 1957) p. 29.

[3] We cite here E. Gruening, The State of Alaska (New York: Random House, 1954), as a fundamental source of information on Alaska's history.

[4] Gruening, p. 395.

[5] Gruening, p. 402.

[6] See J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fisheries (Baltimore: The Johns Hopkins University Press, 1969), pp. 45-47.

PART II. The Law

Introduction

Legislative Purpose

Legislation, whether it deals with fishing or other topics, always reflects purposes or goals. But the path from the enactment of a law to the realization of its purposes is complex and involves many compromises of conflicting interests. Further, the enactment of legislation is merely a statement of principles whose meaning will be manifest in the execution of the law. It is more accurate to say that legislation, at the international level by treaty, or at the national and state levels, creates or sets in motion a mechanism whereby a given set of goals is to be achieved. Thus it is important to examine and understand the totality of the mechanism whereby law is enacted and implemented.

The principal purpose or goal is of course the starting point, and in a typical piece of federal legislation it will be the first question addressed, along with an analysis of the need for the given piece of legislation. Once the goal is established, the legislation must state in at least a general sense which things are going to be prohibited and which are going to be encouraged in order that the goal might be accomplished. These provisions will include guidelines establishing procedures for dealing with conflicts between this particular goal and those established by other legislation.

Administrative Discretion

With a typical piece of federal legislation, after enunciating the provisions, Congress must either designate an existing agency or create a new agency that will be charged with implementing the law. In the early period of U.S. history the provisions established by Congress were often very detailed and specific, leaving little discretion to the agency charged with carrying out the law. Today, however, especially in the case of major legislation dealing with a number of related interests, the provisions express only the intent of Congress and general guidelines. Consequently, the agency charged with implementation of the legislation (i.e., Department of Interior, Department of Commerce, etc.) is selected upon the basis of its existing structure and expertise in the subject matter of the law in question. This agency is frequently given broad discretion in formulating the actual "rules" and regulations which must follow.

Selection of The Enforcement Agency

Since laws always imply the possibility that they will be broken, in enacting legislation Congress must also prescribe guidelines for the penalties that will follow infractions of the law. Congress must designate or create an agency charged with the enforcement of the provisions of the legislation. Moreover, it must prescribe the procedures for enforcement mindful of the constraints of the U. S. Constitution and provide that the structure of enforcement will conform to our federal-state division of powers and jurisdiction. Sometimes, the enforcement agency is

the same as the agency designated to implement the legislation, but frequently the task of enforcement is assigned to one of the existing law enforcement agencies (the FBI, U.S. Coast Guard, etc.). Again, this selection is based upon the agency's established expertise and enforcement capability.

Given the complexity of the process, it is understandable that full implementation of a new piece of major legislation takes a long time, sometimes extending over a period of decades. It is also understandable that human error is going to take its toll, and that a major piece of legislation will require continuous monitoring and inevitable amendment. Indeed, well-crafted major legislation provides in the Act itself for a mechanism for continuous research to determine the validity of the goals established and the effectiveness of the Act's provisions in accomplishing these goals.

Role of Appropriation

Laws also receive continuous review in the budget process. An Act of Congress (or of a state legislative body) will contain an appropriation to provide for its implementation for the first year or perhaps the first few years, but once "on the books" the law will normally be funded on an annual basis in the context of the priority it receives in the general budget of the government. The appropriation, though the final and most brief section of a piece of legislation, can be the most important part of any law. We have seen, for instance, that the laws which Congress enacted to protect Alaska's fisheries during the early Territorial period

went largely ignored since Congressional appropriations for enforcement were either non-existent or inadequate.

* * *

With this general structure in mind, we now turn to an examination of the laws, international, national, and state, which relate to the fisheries of the United States, and, in particular, to the fisheries of Alaska. In our discussion, we will attempt to follow the flow of activity: beginning with the legislation itself, and then examining in turn each of the agencies involved in the implementation and enforcement of the legislation. Some of the legislation will be central to the question of fisheries law; some of it will relate only marginally to fisheries, reflecting correlations or conflicts between the regulation of the world's fisheries and other matters in the interest of the international body, the nation, or the state, which enacted the law.

Fishery Conservation and Management Act (16 USC §1808 et seq.) - Economic History of the Fisheries

The Fishery Conservation and Management Act (FCMA, 1976) is the central piece of federal legislation governing fishing in the waters off the coasts of the United States. It originated in an atmosphere dominated by international considerations. Commercial fishing had long been a big business, but world hunger presssure had brought it to new horizons of production and aspiration.

In the years following World War II, the world catch of fish increased at a rapid rate, from seventeen million metric tons in

1948 to an estimated 100 million metric tons in 1980.[1] During these years a number of nations began the construction and operation of large, fully self-contained distant water fishing fleets. In many cases these fleets were heavily subsidized by their flag state. Though barred by customary international law from participating in the local fisheries of other states, these fisheries extended only three miles from the coastal state, so at the time these fleets began increasing their effort extensively, any fishery beyond the territorial sea was "high seas" and subject to the unregulated exploitation by all nations.

We have seen, however, that this theoretical freedom of the high seas was subject to regulation by treaty as nations competing for resources entered agreements to share them. Moreover, in the decades following World War II, the international climate exhibited a clear trend towards extending the zone of coastal state jurisdiction beyond the territorial sea. In the U.S., as local fishermen experienced increasing competition from foreign vessels operating off the U.S. coasts, Congress responded first with the Bartlett Act (1964), establishing a federal policy with respect to the territorial sea, and later with the Contiguous Zone Act (1966), extending U.S. jurisdiction over its fishery resources to a distance of twelve miles from the coast of the United States.

The Two Hundred Mile Zone

In 1974, the first major push by the Congress to enact legislation created a 200-mile exclusive fishing zone off the

coast of the U.S. Legislation was proposed in the House of Representatives, and hearings were held by the Committee on the Merchant Marine and Fisheries. Although the Committee issued a favorable report, no vote was taken on the floor of the House. In the Senate a similar bill was introduced, and three separate committees, the Commerce Committee, the Armed Services Committee and the Foreign Relations Committee, held hearings. Of these, the first two issued favorable reports, while the Foreign Relations Committee reported unfavorably. The full Senate voted in favor of the bill, but there being no action in the House, no law resulted from the discussions.

In 1975 efforts were renewed in both the House and the Senate. The same committees held hearings, and each issues reports similar to those of the previous year, but in this case the bills passed both the House and the Senate (H.R. 200, October 9, 1975; and Senate 961, January 28, 1975). A Committee on Conference was appointed to consider the two versions of the bill, and its compromise bill passed the Senate on March 29, 1976, and the House on March 30, 1976. The President signed the Act into law on April 13, 1976, with an effective date of March 1, 1977.

Resistance to the New Limit

In order to understand the motivation behind the major provisions of the Act, it may be worthwhile to examine the principal arguments in favor of the bill and the objections of its opponents. The major and prevailing argument of the Act's proponents

was simply that certain stocks were being depleted at a rapid rate. Congress so stated this conclusion in the Introduction to the Act:

> As a consequence of increased fishing pressure and because of the inadequacy of certain conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened. (16 USC § 1801)

Conservation of Stocks

Congress further implied that the foreign fishermen were to a large extent responsible for this depletion and noted that attempts at regulation and conservation by international treaties had been ineffective:

> International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented. (16 USC § 1801)

In expressing these concerns, the proponents of the Act noted the numerous problems of enforcement with existing international treaties relating to fishery conservation. In acting when it did, Congress expressed its view that the problems were serious enough to require immediate action, reflecting a clearly stated fear of the damage that might occur before the proceedings of the U.N. Law of the Sea Congress resulted in the implementation of an acceptable treaty.

Events that had occurred in the years immediately preceding the enactment of the FCMA would seem to confirm these fears. If we consider only, for example, the bottom fish fisheries in the Gulf of Alaska, both of these concerns, the effects of overfishing by foreign fleets and the ineffectiveness of international agreements, become apparent.

At the time of the enactment of the FCMA, halibut fishing in the Gulf of Alaska was regulated by the International Pacific Halibut Commission, which has been in existence since 1924. During the fifty-two years that the Commission regulated the fishery, stocks of the fish had been depleted to the extent that by 1976 it was a fishery in decline and in need of a serious rebuilding program.

Foreign Fishing Efforts

Other stocks in the fishery were being taken at a level that jad been increasing at an alarming rate. A large Soviet fleet, for instance, began operating in the eastern Bering Sea off Alaska in 1959, and by 1962 its trawlers were fishing in the Gulf of Alaska itself. The fleet first targeted Pacific Ocean Perch, but within the span of only a decade depletion of these stocks caused a shift in target species to less heavily exploited fish, such as pollock and mackerel.

Japanese fishermen, already active in the fishery, intensified their effort in the area at about the same time that the Soviets entered it. By that time fishermen from the Republic of

Korea, Poland and Taiwan had also begun fishing in the Gulf, and all of these nations had demonstrated intentions to increase their effort. Thus in a relatively brief period, the bottom fishing industry, almost exclusively a foreign operation, had grown to the extent that when the North Pacific Fisheries Management Council formulated a plan for regulating it (as required by the FCMA), a number of stocks were already in need of rebuilding.[2]

The Foreign Relations Interest in Fisheries Management

As noted above, after holding hearings on the proposed legislation in 1974, and again in 1975, the Senate Foreign Relations Committee issued unfavorable reports on both occasions. Objections raised during this committee's hearings summarize the views of opponents to the legislation. Among these objections was the concern that the assertion of exclusive authority beyond the territorial sea violated the well-established principle of freedom of the high seas, as specifically enunciated in the Convention on the High Seas. Moreover, they pointed out that unilateral extensions in the past had created conflicts, such as the "cod war" between Iceland and England or the "tuna war" between Chile, Ecuador and Peru and U.S. fishermen operating off the coast of South America.

The U. S. State Department was concerned that enactment of the FCMA would prejudice negotiations in progress at the International Law of the Sea Conference. Moreover, the department expressed the fear that such a unilateral decision by the

U.S. would lead to more extensive claims by other nations, perhaps affecting such areas as commercial navigation and naval operations. For these reasons the department urged continued reliance on interim bilateral and multilateral treaties until such time as the Law of the Sea would take effect.

The Effect of FCMA

Two specific objections of opponents to the Act concerned the reactions of the Soviet Union and Japan to the law and possible retaliatory steps by South American nations against U.S. tuna fishermen. Thus far, however, neither of these fears has proved justifiable. Both the U.S.S.R. and Japan have demonstrated a willingness to recognize the extended U.S. authority and negotiate fishing rights for their citizens in the newly-created zone. And since the FCMA specifically excludes authority over migratory species, the relationship between U.S. tuna fishermen and the nations in whose waters they operate continues to be as tenuous as it was before the enactment of the law.[3]

The provisions of the FCMA are contained in four major sections: I. Fishery Management Authority of the U.S., II. Foreign Fishing and International Fishery Agreements, III. National Fishery Management Program, and IV. Miscellaneous Provisions. We now turn to a discussion of each of these titles.

The Fisheries Conservation Zone

The first section of the Act establishes a Fishery Conservation Zone (FCZ) contiguous to the territorial sea of the

United States. The zone extends from the seaward boundary of the territorial sea (the three-mile limit) to a boundary "200 nautical miles from the baseline from which the territorial sea is measured." In this zone the U.S. exercises exclusive management authority over (1) all fish within the zone, (2) all anadromous species throughout their migratory range (except when such species are within the exclusive zone of another nation), and (3) all continental shelf resources. Highly migratory species were excluded from the regulatory authority of the Act because of objections of the U.S. tuna fleet to extended jurisdiction. We should also emphasize again that in the FCMA the U.S. claims extended jurisdiction over these species of fish, but over no other resources or activity in the FCZ. The FCMA has no effect on the authority of the United States to regulate such activities as pollution, navigation, mineral exploration or extraction, though extended jurisdiction on these topical bases is covered in other laws.

The FCMA does not prohibit foreign fishing within the zone. Rather, it outlines the conditions, provisions and priorities under which foreign fishing is permitted. International fishing agreements in effect at the time of the enactment of the law were to remain in effect, but Congress specified that foreign fishing not covered by existing international treaties was to be permitted only pursuant to a "governing international fishing agreement." These agreements do not necessarily constitute treaties, and thus do not require the ratification of the Senate.

As a consequence of this provision the President was able to enter quickly interim agreements with the nations actively engaged in fishing in the zone at the time of the enactment of the law.

Among the items which must be contained in each governing agreement, the Act requires that the foreign nation must "acknowledge the exclusive fishery management authority of the United States, as set forth in this Act." And though not a requirement, the law expresses the "sense of Congress that each such agreement shall include a binding commitment" that the foreign vessels will obey the regulations, harvest no more fish than that allowed for in the particular fishing area, and comply with provisions designed to facilitate research and enforcement.

Enforcement Provisions

The enforcement provisions are perhaps the most sensitive of these stipulations. Some are not controversial, such as documentation requirements, but others include the foreign vessel's commitment to permit enforcement officers "to board, and search or inspect, any such vessel at any time." These officers will have the authority to make arrests and seizures for violations of the terms of the agreement. These assertions of authority are a major intrusion on traditional freedom of the seas concepts and recognition of vessel autonomy under customary international law.

Moreover, the vessels are to agree to the installation of electronic position-finding equipment on board and to the con-

tinuous presence of on-board U.S. observers at the expense of the foreign nation or the vessel's owners.

Not all of the governing agreements have included such a commitment, especially on the question of U.S. observers. And from a law enforcement standpoint we should note that even when these observers are onboard the vessel their function is primarily one of research. They of course cooperate with law enforcement officers and may report suspected violations, but they are not onboard for the purpose of making arrests. Though their presence itself may serve as an inhibition, it would simply not be practical to expect one unarmed scientist to arrest the entire crew of a large vessel, much less seize it.

Foreign fishing in the zone is limited to what the Act terms the "Total Allowable Level of Foreign Fishing," and defines as "that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States." With this provision Congress clearly intended that U.S. fishermen would be given the first opportunity to harvest the catch.

As the U.S. industry develops and increases its effort, the level of foreign fishing in the zone will, in theory, diminish. Development in the U.S. industry could lead to a point where U.S. fishermen catch the entire allowable catch, and all foreign fishing in the zone would have to cease. In practice this has occurred in fisheries that were already overfished at the time of the enactment of the law (i.e., the crab fisheries off the coast

of Alaska), but especially in the North Pacific the interest and capability of the U.S. fleet in many of the fisheries, particularly bottom fish fisheries, is such that total exclusion of foreign vessels from the zone is not likely to occur for a decade or more.

Resource Allocation and Foreign Interest

Congress assigned the task of allocating the allowable level of foreign fishing among nations to the Secretary of Commerce (the Commerce Department is the primary implementation agency for the FCZ), in conjunction with the Secretary of State. As guidelines, the Act specifies that these officials consider (1) the traditional participation of the nation in the fishery, (2) the extent to which the nation assists the U.S. in research activities in the fishery, (3) the extent to which the nation cooperates with the U.S. in its enforcement activities, and (4) "such other matters as the Secretary of State, in cooperation with the Secretary of Commerce, deems appropriate."

The first three of these considerations serve to effectively minimize new entry into the fishery of nations not already active there at the time of the enactment of the law. But the fourth consideration is more vague in scope and may open the door to political considerations not related to the health of the fishery. Such was the contention of the State of Maine, for instance, when it challenged the 1977 herring quota which the Secretary of Commerce established for the Georges Bank (State of Maine v. Krepps, 1977). In that case the court upheld the

Secretary's explanation of an unusually high foreign allocation because of the necessity of "honoring commitments to other nations," noting that this consideration could not be construed as a loophole for circumventing management goals whenever the Secretary chose, since the commitments were negotiated at least in part before the effective date of the Act.

However, the argument of prior commitments could not be made when the Soviet fleet was excluded from the FCZ following that nation's invasion of Afghanistan in 1981, though no domestic interest was likely to contest the decision. Until a definitive decision is rendered on the issue, there remains a clear potential for "trade-offs" in the national interest, such as increased Japanese participation in fishing in the zone in exchange for a reduction of exports by that country of automobiles or television sets to the U.S.

In one of the early amendments to the FCMA, the 96th Congress required a reduction by at least 50% of a nation's allocation for a period of one year if the nation was found to be engaged in activity which diminishes the effectiveness of the International Convention for the Regulation of Whaling.

Reciprocity Clause

The second section of the Act also contains a reciprocity clause, requiring that a nation fishing in the FCZ "extend substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to

foreign fishing vessels." It also contains rather specific instructions to the Secretaries of Commerce and State regarding such items as the renegotiation of existing treaties and agreements, negotiations for the establishment of boundaries with Mexico and Canada, and reporting to Congress.

Basically these instructions are intended to provide for respect of the rights of the U.S. distant water fishing fleet, to provide for a smooth transition to full implementation of the Act, and to provide for adequate Congressional oversight. Congress did not require that the governing agreements receive its explicit approval (as would be the case for the ratification of a treaty by the Senate), but merely provided for a mandatory 60 day waiting period between the submission of a proposed agreement to Congress and its effective date. During this period Congress may disapprove the agreement by the passage of a joint resolution. Since the proposed governing agreement is a public document (printed in the Federal Register), the 60 day waiting period could also be construed as an opportunity for public comment.

Section 1824 of the law, "Permits for Foreign Fishing," sets detailed documentation procedures and requirements which the Secretary of Commerce and the foreign nation must follow in order for permits to be issued. The foreign nation is not simply given a quota, but must specify the particular vessels, their capacity, the area in which they will operate, the estimated portion of the nation's quota that each vessel will take, whether or not the

vessel will receive at sea from U.S. fishermen a portion of their harvest, and, if so, how large a portion. The 95th Congress added a processors amendment to the Act which permits foreign processors to receive fish from U.S. fishermen only if the Secretary of Commerce determines that U.S. processors lack the capability of processing the entire U.S. portion of the catch. Section 1824 also establishes guidelines for setting fees for the permits, considering, among other things, "the costs of fishery conservation and management, fisheries research, administration, and enforcement."

FCMA Management Standards

The third section of the FCMA establishes seven national management standards which are designed to create a sound and uniform national policy on the management of the fisheries contained in the FCZ. The first of these defines the goal as that of preventing overfishing and achieving on an annual basis the optimum sustainable yield from each fishery. In selecting the optimum sustainable yield as the goal, Congress departed somewhat from the traditional trend in fishery management. For many years management authorities in fisheries directed their policies toward achieving a maximum sustainable yield. The difference between the two terms is that the maximum sustainable yield is defined solely in biological terms. Economists criticized this approach, pointing out that in order to obtain the greatest economic benefit from a fishery the annual yield should be somewhat lower than that which the fishery is biologically able to

sustain.[4] In the FCMA, the "optimum sustainable yield" is defined as that yield which will provide "the greatest overall benefit to the nation," specifying that this yield will be "the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor." All of these modifications constitute non-biological consideration.

The other national standards provide that Conservation and Management policies be based upon the best available scientific information, that individual stocks of fish, to the extent that it is practical, be managed as a unit throughout their range, and that interrelated stocks be managed as a unit or in close coordination. The standards further require that policies not discriminate between residents of different states, that they be efficient, without, however, having economic allocation as their sole purpose. Although the goal of the standards is to achieve some uniformity in fisheries management at the national level, Congress was aware of the diversity of the fisheries, and in the sixth national standard provided that management schemes take into account and allow for variations among fisheries. The seventh standard requires that conservation and management schemes minimize their costs of implementation and enforcement.

The Regional Administration System

The FCMA represents the first large scale entry by the federal government into the field of fishery management, a field that has traditionally been left to the states. Consequently Congress was careful to provide procedures that would ensure a

strong degree of local participation in the formulation of policy. For this reason, the FCMA establishes eight Regional Fishery Management Councils with the authority to draw up management plans. The Councils are:

(1) The New England Council

(2) The Mid-Atlantic Council

(3) The South Atlantic Council

(4) The Caribbean Council

(5) The Gulf Council

(6) The Pacific Council

(7) The Western Council

(8) The North Pacific Council.

The last of these Councils, the North Pacific Management Council, consists of the states of Alaska, Washington and Oregon, but its area of authority comprises only the fisheries of the coast of Alaska.

In all of the regional management councils the Act specifies the membership in such a manner as to ensure an active role to local authorities. The senior state official actively involved in fisheries is a member, as is the senior federal official for the region. At-large members are appointed by the Secretary of Commerce from a list of candidates submitted by the governors of the states contained in the region.

In the North Pacific Fishery Management Council, for instance, the eleven voting members are the commissioners of

fisheries or fish and game of the three states (Alaska, Washington and Oregon), the director for the Alaska region of the National Marine Fisheries Service (a division of NOAA, Department of Commerce), and seven at-large members of which five are nominated by the Governor of Alaska, and two are nominated by the Governor of Washington. In addition, the Council has four non-voting members: the Commander of the 17th District (Alaska) of the U.S. Coast Guard, the Director of the Pacific Marine Fishery Commission, the Director for the Alaska Region of the U.S. Fish and Wildlife Service (Department of the Interior), and a representative of the Department of State.

Each Council in turn appoints a scientific and statistical committee to give it the information necessary to perform its task. The Secretary of Commerce is also required to initiate a comprehensive program of fisheries research at the national level (National Marine Fisheries Service). Of course, the ability of the Secretary to do this depends upon the availability of appropriated funds.

The task of the Councils, as defined in the FCMA, is "to prepare and submit to the Secretary of Commerce a fishery management plan with respect to each fishery within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary." Besides this task, the Councils comment on applications for foreign fishing before permits are issued.

Council Procedures

In the Act, the process which the Councils must follow in the formulation of management plans is outlined in some detail. As a means of ensuring adequate public participation also at this level, the Councils must hold public hearings. Each plan must conform to the national standards enunciated in the Act, and each must contain certain provisions, such as a description of the fishery, an assessment of the optimum sustainable yield and the maximum sustainable yield, and an assessment of the capacity of the U.S. fishing fleet and the U.S. processing industry to harvest the optimum yield. The Councils must then make a recommendation regarding the portion of the optimum yield which should be allocated to foreign fishing vessels. In addition to these required provisions, the Councils have discretionary authority to formulate regulations in the areas of permissible fishing gear, open and closed areas and periods, sex and size limitations of species, and limited access to a fishery.

Management Diversity

Though these provisions, and the national standards, promote a national uniformity of purpose and methodology, the actual management plans that the Councils have developed have been quite diverse, with each reflecting the particular charcteristics of the fishery.

For example, the groundfish plans formulated by the North Pacific Fishery Management Council for the Bering Sea and the Gulf of Alaska both reflect the fact that the fisheries are

largely foreign fisheries which U.S. domestic interests would like to develop, as a national industry. The provisions of the plans therefore seek to achieve a rapid rebuilding of stocks which have been depleted, especially halibut stocks since these are the only ones currently harvested extensively by the U.S. fleet. The plans also reflect the fishing technique. Since these fisheries are basically trawl fisheries, the harvest contains a wide variety of species and the incidental catch of prohibited species is difficult to control. The regulatory method thus closes an area during periods when the trawlers are likely to catch incidentally species which the plan seeks to rebuild, such as halibut, or species which the plan does not cover, such as shrimp or crab.

Species Variation

The wide variety of species in the fisheries also present unique enforcement problems. Since the trawler cannot discriminate between species in his catch, when the quota for one species in a given area is reached, the area is closed to all species and all fishing must cese. Violators commonly seek to thwart this provision by logging a species for which they have approached their quota as a species for which they still have a considerable portion of their quota to catch. The enforcement officer must thus have the ability to distinguish between the different species (in both their processed and unprocessed form since many large trawlers process on board). This ability includes that of being able to recognize attempts by the violator to disguise one

species as another through processing or storage. The character of the fisheries thus has a profound effect on the level of sophistication of the violators and the expertise required of the enforcement officers. In the period immediately following the enactment of the FCMA the most common offenses were underlogging; that is, catching fish without entering it in the required log. More recently offenses have involved species manipulation and overlogging: offenses in which an entry is made in the log book but under a species different than that of the actual catch.

The Tanner Crab Fishery off Alaska is on the other hand basically a domestic fishery that was already heavily regulated by the State of Alaska prior to the enactment of the FCMA. The management plan adopted by the North Pacific Management Council therefore basically adopted the regulations of the State of Alaska regarding gear restrictions, seasons and closures, sex limitations, size limits and harvest levels. Of the two species of crab involved, the Chinoecetes bairdi and the Chinboecetes opilio, the domestic fleet has traditionally targeted the larger bairdi strain, while the foreign fleets (Japanese, and until 1972, the Soviet Union) targeted both strains. Since the Council decided that the U.S. fleet has "the intent, desire, and capacity to fully harvest the OY [optimum yield]," the plan adopts the strategy of excluding foreign vessels from those areas where the domestic fleet operates extensively and where the bairdi strain is prevalent. This prevents gear conflicts and limits the incidental catch of this strain by foreign vessels. The plan

prescribes that foreign fishing be restricted to two areas of the Bering Sea which are estimated to contain only about 2% of the bairdi species targeted by the U.S. fleet. The quota for foreign fishing, which is set on an annual basis, was 15,000 metric tons of the opilio species in 1978. There was no allocation for the bairdi strain. This figure represents a considerable reduction in the level of harvest by foreign vessels prior to the enactment of the FCMA.

Power of The Secretary

Once a management plan is formed, the Council submits it to the Secretary of Commerce. If approved, it is published in the Federal Register and goes into effect after a period of 45 days. This delay is designed to provide for another period of public comment at this last stage of the process. The Secretary of Commerce may also ask the Council to make specific changes in the plan, and has the authority to make changes on his own if the Regional Council fails to do so. As a safeguard against possible damage to the fishery during the lengthy process required to form a management plan, Congress also gave the Secretary of Commerce the authority to issue emergency regulations and emergency amendments to existing management plans, though these are limited to an operative period of 90 days.

State Role in FCMA

Section 1856 of the FCMA addresses the perhaps controversial question of state jurisdiction. Basically, the zone created by the Act is understood to be an area of federal jurisdiction, but

it is not clear that Congress intended to fully dominate the field of fishery management to an extent that would preclude all state legislation regulating fishing in the FCZ. As we say in Chapter One, prior to the FCMA, states were actively regulating certain fisheries beyond their territorial seas, especially fisheries involving species which freely migrate between the territorial sea and the high seas. In some cases, such as regulation by the State of Alaska of the crab fisheries, the areas regulated lie almost entirely in the FCZ, beyond the three-mile limit.

The relevant part of section 1826 of the FCMA reads as follows:

> Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

It is clear from this language that the status of state jurisdiction within the three-mile limit remains unchanged, although later in this section of the Act the Secretary of Commerce is authorized to preempt state authority and assume management authority within the state's territorial sea if he finds that the state is acting in a manner which adversely affects the management goals of the FCMA.

Beyond the states' territorial seas, the status of jurisdiction remains unclear. The critical line in section 1856 is the

phrase, "unless such vessel is registered under the laws of such State." As we have seen, state jurisdiction prior to the FCMA was based on the fact that the participants were its own residents, or, in the case of non-residents, state jurisdiction was based upon a legitimate state interest and a significant nexus or connection between the fishermen and their activity and facilities within the state, or state licensing procedures.

The FCMA does not define the term "registered," but the fact that Congress used this particular term would indicate an intention of altering somewhat the status quo. Although there is no federal litigation on the subject, the California Supreme Court in a 1980 decision (People v. Weeren) stated that licensing or other documentation probably constitutes registration.

On the basis of this case and the language of the Act, it seems that in the absence of a FCMA management plan states may continue to enact and enforce legislation affecting fishing in the FCZ as long as they have a legitimate interest in the fishery. With an FCMA management plan in force, states may continue to enforce their own laws if these laws do not contradict the federal management plan.

The question of jurisdiction in the FCZ has implications in the area of law enforcement. For example, in the case of the Tanner Crab fishery, the state regulations are nearly identical to those contained in the FCMA plan, so the state continues to enforce its laws in the FCZ and offenses continue to be prose-

cuted in state courts. Foreign vessels operating in the fishery are not registered by the state in any sense of the word, so the state has no jurisdiction over foreign fishing in the FCZ.

Cooperative Enforcement

As a practical matter, the division of law enforcement responsibility since the enactment of the FCMA has been that the federal enforcement agencies (the National Marine Fisheries Service in cooperation with the U.S. Coast Guard) have targeted their effort on foreign vessels, whereas the state agencies (in Alaska, Department of Public Safety, Division of Fish and Wildlife Protection) enforce the regulations regarding domestic fishermen. A division of responsibility such as this is provided for in section 1861 of the FCMA, and in the area under the authority of the North Pacific Fishery Management Council, it is sanctioned by a "Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska" (December, 1978). Under this agreement, enforcement officers of the state are authorized to act as federal officers, and enforcement officers of the National Marine Fisheries Service are deputized as State of Alaska Peace Officers.

Penalty Provisions

Section 1837 of the Act defines the prohibited acts. Essentially, these are any violations of the provision of management plans in force or any interference with law enforcement officials that might prevent them from performing their task. The Act also prohibits the possession, buying, selling or

transporting of fish caught in violation of the Act. Of these prohibited acts, those involving interference with enforcement officials are defined as criminal offenses, whereas the others - gear or catch violations, fishing in a closed area, etc. - are civil offenses. For foreign vessels, fishing within the territorial waters of a state is a criminal offense, as is fishing in the FCZ "unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit."

The FCMA provides for civil penalties of fines and forfeiture of vessel and gear. A significant feature of the law is the provision which makes forfeiture of the catch mandatory, and moreover, it is assumed that all of the catch was caught illegally. Section 1860 states:

> [I]t shall be a rebuttable presumption that all fish found on board a fishing vessel which is seized in connection with an act prohibited by section 307 were taken or retained in violation of this Act.

Enforcement officers are given broad powers under the terms of the law, and since the Act is both clear and specific, it is worthwhile to quote this section in full:

> POWERS OF AUTHORIZED OFFICERS. -- Any officer who is authorized (by the Secretary of Commerce, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a) to enforce the provisions of this Act may --
>
> (1) with or without a warrant or other process --
>
> (A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 307;
>
> (B) board and search or inspect, any fishing vessel which is subject to the provisions of this Act;

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this Act;

(D) seize any fish (wherever found) taken or retained in violation of any provision of this Act; and

(E) seize any other evidence related to any violation of this Act;

(2) execute any warrant or other process issued by any court of competent jurisdiction; and

(3) exercise any other lawful authority.

(Section 1861)

The federal district courts are designated in the Act as the courts of authority.

Enforcement officers are also given the discretion of issuing citations for minor offenses. These are more or less warnings; they are recorded but involve no fines. In practice, citations were issued mainly in the period immediately after the effective date of the law when its provisions were unclear.

Relation of FCMA to Other Laws

The Miscellaneous Provisions of the final section of the FCMA deal with four topics. The first of these is the UN Conference on the Law of the Sea, and the others represent amendments to the Fishermen's Protective Act, the Marine Mammal Protection Act, and the Atlantic Tunas Convention.

With respect to the Law of the Sea conference, the provisions authorize the Secretary of Commerce, after consultation with the Secretary of State, to promulgate any amendments to the FCMA which would be necessitated by ratification of a Law of the Sea

Treaty by the United States.

The Fishermen's Protective Act, which we discussed briefly in Chapter One, was passed by Congress in response to claims of exclusive fishery authority over a 200-mile zone by Chile, Ecuador and Peru. At the time of these claims the U.S. recognized only a three-mile limit, and in order to support the domestic tuna fleet which operated extensively in the zones claimed by these countries, the federal government agreed to pay any fines or losses incurred by U.S. tuna fishermen in violation of these claims. With the new U.S. claim of a similar exclusive zone (but excluding highly migratory species), the language of the Fishermen's Protective Act had to be changed for the Act to remain in force in the zones of other countries unless those countries' laws contain a similar exclusion.

At the time of passage, both the Marine Mammal Protection Act and the Atlantic Tunas Convention applied only to the area extending to twelve miles from the baseline (the Contiguous Zone Act, 1966). The amendments contained in the FCMA extend the area covered by these Acts to include the entire Fishery Conservation Zone.

Post-FCMA Treaties

Since prior to the Fishing Conservation and Management Act the United States had claimed only the authority to regulate foreign fishing within a twelve-mile zone, passage of the new legislation required renegotiation of fishing treaties between

the United States and many other countries. Many of these new agreements contain like provisions, the most important of which is, of course, acceptance of the new demarcation of the fishery conservation zone. The treaties also provide for inspections to ensure compliance with treaty stipulations and for prosecution of violations according to U.S. domestic law.

The list of countries which signed such agreements in the period immediately following passage of the FCMA includes the following: Germany, Bulgaria, Romania, Japan, China (Taiwan), Poland, Korea, Spain, Mexico, the Soviet Union, and the European Economic Community. Of these treaties it will be sufficient to examine in detail only that with Japan, but the structure of this agreement is representative of that of the others, and Japan constitutes perhaps the most important foreign presence in Alaskan fisheries.

Treaty with Japan

Under the treaty (28 UST 7507) Japan recognizes the U.S. right to the FCZ while the United States agrees to seek optimum utilization of the Alaskan groundfish fishery and, in so doing, to take into account the pattern of traditional fishing by Japanese nationals, the need to minimize economic dislocation, the contributions made to fishery research by Japan, and the previous cooperation on the part of Japan in conservation measures. The two countries agree to consult each year to determine the total allowable catch for each fishery resource, the portion of the catch to be allocated to Japan and the measures necessary to

prevent over-fishing. In addition, the agreement provides for continued exchange of scientific data. Japan is required to cooperate in U.S. enforcement measures and to refrain from killing marine mammals except as permitted under other international agreements.

To facilitate enforcement each Japanese vessel seeking access to the fishery must apply for a permit. The request for the permit must supply information concerning the owner, operator and registration of each vessel, its tonnage, capacity, speed, processing equipment and type and quantity of fishing gear. In addition, the application must specify each fishery in which the vessel desires to work, the amount or tonnage of catch contemplated and the ocean area and time period in which fishing will be conducted.

Japan also agrees to submit to the National Marine Fisheries Service by May 30 of each year the following information on its industry effort: the catch in metric tons, the effort in hours trawling, the effort in number of longline units, seine nets and pots, the effort in number of hours of longline or pot soaking time and the effort in number of days fishing by vessel class, gear type and month by half degree latitude times one longitude statistical area. This information must be submitted for the following species groups: yellowfin sole, rock sole, arrowtooth flounder, flathead sole, dover sole, Pacific ocean perch, herring, Pacific cod, sablefish, pollock, atka mackerel, other rockfish, other flounders, king crab, tanner crab, other species

taken in excess of 1,000 metric tons, and all other species combined. Moreover, Japan must also submit provisional monthly information on catch in metric tons and effort in vessel days for the following species: king crab, tanner crab, pollock, Pacific cod, rockfish, flatfish, sablefish, herring and others.

This catch information must be supplied for these geographical areas: Bering Sea (subareas 1, 2, 3, and 4), Aleutian region, Shumagin region, Chirikoff region, Kodiak region, Yakutat region, Southeast region, Charlotte region, Vancouver region, Columbia region, Eureka region, Monterey region, Conception region and any other designated areas.

Finally, Japan agrees to supply by May 30 of each year biological information on the catch. This information shall include representative length, age and weight statistics for each species caught. These statistics must reflect the vessel class, the gear used and the time and area of the catch. Further biological information can be required if NMFS deems it necessary.

Under this treaty enforcement within the fishing conservation zone is the responsibility of duly authorized agents of the United States government, and prosecution of violators proceeds according to U.S. domestic law.

Other Treaties

The other treaties signed after the passage of the FCMA are similar to the one with Japan in their basic provisions for limitations on fishing activity, exchange of biological information,

licensing procedures and enforcement measures. They differ primarily with respect to species and areas involved.

Halibut Convention

Halibut fishing in waters off the west coasts of Canada and the United States is regulated under the terms of the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea. This agreement was first signed in 1953 and has been periodically amended since then to provide for certain changes in the fishery, including extensions of national jurisdiction. The waters now covered by the convention include portions of the fishing conservation zones of both countries.

Under the terms of the treaty the International Pacific Halibut Commission, composed of representatives from both countries, manages the fishery. This commission has the authority to:

1. divide the waters covered by the convention into areas;
2. establish open or closed seasons by area;
3. limit the size of the fish and quantity of the catch to be taken during a season;
4. during both open and closed seasons limit the amount of halibut which can be taken as incidental catch by vessels fishing for other species;
5. fix the size and character of the gear to be used in any area;
6. make regulations for the licensing of vessels and for the

collection of statistics on the condition of the fishery; and

7. close to all taking of halibut any areas or parts of areas found to be populated by small, immature halibut and designated as nursery grounds.

The commission publishes reports of its investigations and other activities. The regulations which it adopts are designed to promote the optimum sustainable yield.

Each country may enforce the convention regulations against its own vessels and nationals and those of any third parties in all convention waters. In that portion of the convention waters in which it exercises exclusive fisheries jurisdiction each country may enforce the regulations against vessels or nationals of both countries and those of any third parties. A portion of the waters covered by the treaty is the subject of a boundary dispute between the U.S. and Canada. In this disputed area enforcement of the convention is solely the responsibility of the flag state.

Canadian vessels working in the U.S. fishery conservation zone must obtain permits from the U.S. government, and they must report to U.S. officials before entering or leaving the zone. At such times they are required to supply information concerning the registration of the vessel, the area of fishing, the anticipated or actual size of the catch and the anticipated port of delivery.

Although the treaty provides for regulation of halibut

fishing in the waters of both countries, in actuality the effort of U.S. vessels in Canadian waters has declined in recent years.

The halibut fishery covered by this agreement is not subject to the terms of the FCMA, but representatives from the International Pacific Halibut Commission regularly communicate with members of the North Pacific Fisheries Management Council.

International Convention for the High Seas Fisheries of the North Pacific Ocean

High seas salmon fishing in the fishing conservation zone is regulated under the terms of a treaty signed by the United States, Canada and Japan. This agreement, which was originally negotiated in 1952 as one of the first major international treaties regulating fishing in the North Pacific, has since been amended periodically, most notably after passage of the FCMA.

The United States and Canada themselves do not work the high seas salmon fishery since it is economically more efficient to take salmon closer to the streams of origin, but, in order to ensure an adequate escapement for domestic fishermen, the two countries find it necessary to limit Japanese activity in the fishery.

Under the terms of the Convention Japan agrees to limit her activities as follows:

(a) North of 56° North Latitude, east of 175° East Longitude and outside the United States fishery conservation zone, beginning on June 26 (Japan Standard Time) (1500 June 25 GMT) of each year, the Japanese mothership fishery shall

conduct no more than 22 mothership fleet days in the area between 175° East Longitude and 180° Longitude and no more than 31 mothership fleet days in the area between 180° Longitude and 175° West Longitude.

(b) North of 46° North Latitude, between 175° East Longitude and 170° Longitude, and outside the United States fishery conservation zone, salmon fishery operations shall not begin before June 1, (Japan Standard Time) (1500 May 31 GMT) of each year.

(c) West of 175° East Longitude, and within the United States fishery conservation zone, salmon fishery operations shall not begin before June 10 (Japan Standard Time) (1500 GMT) of each year. Fishing vessels engaged in this fishery shall be required to have on board a registration permit which shall be issued by the Government of the United States. Such vessels may be required by the Government of the United States to accept on board scientific observers and to bear the expenses incurred in such boarding. The requirement of the Government of the United States that Japanese fishing vessels engaged in this fishery have on board a Certificate of Inclusion relating to the incidental taking of marine mammals shall be suspended for the period ending June 9, 1981 during which period the Governments of Japan and the United States shall conduct joint research, shall cooperate to determine the effect of the Japanese salmon fishery on marine mammal populations, and shall work to reduce or eliminate the incidental catch of marine mammals in the fishery.

(d) Except for the areas specified in (a) above, there shall be no salmon fishery operations east of 175° East Longitude, unless such fishery operations are agreed to for a temporary period among the three Contracting parties.
(TIAS 9242)

Moreover, the Japanese fishermen may not make changes in gear or fishing procedures which would affect current fishing efficiency without the approval of the governments involved in the agreement.

Enforcement of the treaty within the national FCZ is the responsibility of the coastal state and is conducted in accord-

ance with domestic law; beyond the two hundred mile limit enforcement may be by any of the three nations, but violators must be delivered to the flag state for prosecution.

To assist in the enforcement of this and other fishery agreements with Japan the United States assigns a full-time fishery attache to the embassy in Tokyo who, among other duties, monitors the movement of the Japanese fishing fleet. Moreover, U.S. scientific observers on board each Japanese mothership also collect data necessary for enforcement.

The treaty established the International North Pacific Fisheries Commission (INPFC) whose primary purposes are to facilitate scientific studies and to provide a forum for cooperation among the United States, Canada and Japan. This commission, which is composed of representatives from all three countries, meets annually in Vancouver, Tokyo or Anchorage. One of its major lines of scientific inquiry is research into the origins of the salmon stocks in the fishery. While some of the salmon are of U.S. or Candian origin others are Asian. As more information becomes available concerning the distribution of the various stocks within the convention area the Commission may recommend the readjustment of certain boundaries.

Because many of the salmon in this fishery originate in the Soviet Union, the Soviet government also has an interest in the management of the area. It is not, however, a party to the International Convention for the High Seas Fisheries of the North

Pacific Ocean, but instead maintains a separate bilateral agreement with Japan. This separate treaty affects the implementation of the Japan-Canada-United States agreement because the Soviets set a specific catch limit for the Japanese. Part of this catch can only be caught outside Soviet territory and within the United States FCZ. Thus, the Soviets indirectly allocate U.S. resources although the Japanese catch so allocated must, of course, be taken in accordance with the provisions of the Japan-Canada-United States treaty as described earlier. To enforce their treaty with the Japanese the Soviets sometimes board Japanese fishing vessels even within the U.S. fishing conservation zone.

The international complexities presented by the operation of this fishery and others gave rise to a statement in the International Convention for the High Seas Fisheries of the North Pacific Ocean that the three participating countries would work toward the formation of a forum broader than the INPFC itself. As a result, the United States, Canada and Japan are attempting to form a group which would include all countries of the Pacific rim. The primary purpose of such a forum would be scientific cooperation, but its work would also inevitably affect diplomatic aspects of the conduct of fisheries.

Additional International Agreements

COLREG

The United States also subscribes to several additional

international agreements which indirectly affect the fishing industry; most of these have been negotiated through the International Maritime Commission (IMCO) which is a branch of the United Nations. One of the most important of these agreements is the Convention on the International Regulations for Preventing Collisions at Sea (COLREG). This agreement, essentially a codification of customary maritime practice, lists specific rules for navigation. These include requirements for the display of "lights and shapes," procedures to be followed in limited visibility, steering and sailing rules, and distress signal regulations. The convention also acknowledges the right of local authorities to make additional rules regarding navigation in harbors, rivers, lakes and inland waters.

LOAD LINES

Another major agreement in which the United States participates is the International Convention on Load Lines (LOAD LINES). This treaty specifies the weight of cargo a particular vessel is permitted to carry. Under the terms of the agreement a load line certificate which indicates the particular limitations of an individual vessel must be carried on board. In the ports of countries which subscribe to the agreement authorized agents of the nation may board a vessel to determine if it is in compliance with the regulations specified on its certificate. If found in violation the vessel may be prohibited from sailing.

SOLAS

The United States also is a party to the International Convention for the Safety of Life at Sea (SOLAS). This agreement lists the kind of safety equipment (such as lifeboats, rafts and buoys) required on board particular vessels, the radio equipment to be carried, the construction specifications to be met, and the safety procedures to be followed. In general, SOLAS applies to passenger and cargo vessels, but some of its provisions, especially those specifying safety equipment, also apply to whaling, fish processing, and canning ships.

OILPOL, INTERVENTION, CLC and FUND

Four international agreements in which the United States participates relate primarily to the impact of the oil industry on the maritime environment. These include: the Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution (INTERVENTION), the Convention on Civil Liability for Oil Pollution Damage (CLC), and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND). As a group, these agreements attempt to prevent, mitigate, or compensate for damage to the environment from oil pollution.

Enforcement

Under most international agreements such as those discussed above, the flag state bears the primary responsibility for enforcement but provision is also sometimes made for limited

foreign ship jurisdiction. For example, under the terms of SOLAS the authorized agents of a participating nation may board vessels of another participating state to inspect for compliance and can refuse entry to port for those ships found in violation. In the United States the Coast Guard serves as the main U.S. enforcement agency for these international conventions.

State Management Law

The FCMA is federal legislation, but it does not preempt entirely the role of the individual states in fisheries law. Many officials have expressed the view that in fisheries where there is no foreign involvement and in which existing state management plans conform to the national standards, there is no legislative mandate that the regional council adopt a separate, federal management plan. It may simply delegate the management of the fishery to state authorities. This has occurred in the North Pacific, where the management council rules that since the state possessed the foundation of research and the enforcement capability, which the federal government lacked, management of the King Crab fishery should be left to the State of Alaska.

States also participate heavily in the regional councils established by the FCMA, and they continue to exert the exercise of their legitimate jurisdiction over fisheries in areas not covered by the federal law. For this reason, we now turn our attention to the question of state legislation affecting the fisheries of Alaska. In our discussion we will not attempt to examine all of this legislation, but will rather focus upon two

questions which are of special interest to Alaskan fishermen: limited entry and the laws of the state regarding subsistence fishing.

Biological Regulation

The fishing regulations of the State of Alaska, though complex, reflect both the characteristics of the fish and the traditional fishing patterns of those who harvest them. Regulation is primarily biological. Specific regulation are subject to frequent change, depending upon the abundance of the fishery from season to season. Regulations are not laws in the sense that they are not passed by the legislature, though by statute they have the force of law. The power to adopt regulations is delegated by law, by the legislature to an administrative board. Regulations are determined and promulgated by the Board of Fisheries on an annual basis or more often.

Limited Entry (AS 16.43)

The state's Limited Entry Program was enacted by the Legislature in 1973. Since it is the most recent and perhaps the most controversial of Alaska's major legislation concerning its fisheries, the subject merits more extensive consideration than changeable fishing regulations.

The Dispute Over Exclusive Fisheries

During the territorial period many Alaskans held strong feelings of resentment toward what they considered the exploitation of their fisheries by "outside" interests. As we saw in

Chapter One, this resentment frequently focused on fish traps and the policies governing their use, which tended to grant exclusive property rights in the area in which the traps were placed to the owners of the traps.

The intensity of feeling was such that the voters, prior to statehood, took the action necessary to ensure that the abolition of fish traps would occur concurrently with statehood. Moreover, the authors of the State Constitution included a clause designed to ensure that no division of the fisheries which granted exclusive use to any individual or group would ever occur. Section 15 of that document reads:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Consequently, fishery management schemes limited their tools to the regulation of the fishing gear, the fishing area, and the fishing time.

In the span of little more than a decade, however, the proliferation of gear in Alaska's salmon fisheries was such that both fisherman and regulator recognized the fact that the open access system was no longer workable. Between 1960 and 1972 the number of units of gear licensed in the Alaska Salmon Fishery increased from 6,512 to 11,363.[5]

With too many fishermen in the fishery, the total catch divided among them was simply not enough to provide each with a

viable income. In addition, an excessive level of gear operating in a fishery makes management schemes unworkable. Conservation of the resource requires a certain level of escapement, and with too much gear operating the result is a reduction of the duration of the open period. It leads to such things as two 12-hour fishing periods per week. If the run lasts three weeks, this translates into a total of 72 hours of fishing per year. No matter how strong the run is, the fisherman will have difficulty gaining an adequate economic return for his effort.

Too much gear also makes management of the resource haphazard. Salmon spawning runs to fresh water streams are not continuous or steady. The runs are characterized by peaks in which the bulk of the run enters the streams in a very brief period of time. With excessive levels of gear and only a few, brief fishing periods, a misjudgment of only a few hours could endanger the entire run or, in the opposite sense, could have the fishermen operating only during periods when the fish are not in the waters, and they would all go home empty-handed.

History of Regulation of Outsiders

The 1973 legislation on Limited Entry was not the first attempt by the State of Alaska to regulate the number of participants in its salmon fisheries. In 1961 an Act was passed which attempted to temporarily exclude non-resident fishermen from an area if the actual run was substantially lower than the "optimum" run. The law was contested in federal court by non-resident fishermen and ruled invalid because it violated consti-

tutional privileges and immunities, and the Commerce Clause (Brown v. Anderson, 1962).

Again, in 1968, the Legislature enacted a law limiting issuance of salmon net gear licenses to persons already holding a gear license or to persons who had held a commercial fishing license for three years. This law too was held invalid, this time by an Alaska Superior Court (Bozanich v. Norenberg, 1971), because it violated section 15 of the Alaska State Constitution.[6]

Constitutional Amendment

Recognizing this dilemma, the citizens of Alaska reconsidered the territorial insistence on open access, and in 1972 voted to amend section 15 of the Constitution to add the following phrase:

> This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Limited entry is primarily economic legislation and facilitates conservation and efficient management of the resource from an economic rather than a biological perspective. The Legislature expressed this purpose in the initial paragraphs of the Act:

> It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.
>
> The legislature finds that commercial fishing for fishery resources has reached levels of participation,

on both a statewide and an area basis, that have impaired or threaten to impair the economic welfare of the fisheries of the state, the overall efficiency of the harvest, and the sustained yield management of the fishery resource (AS 16.43.010).

The Commission

The Limited Entry legislation in essence establishes a new regulatory scheme governing the use of commercial fishing gear in Alaska's fisheries. This scheme is administered by the Commercial Fisheries Entry Commission, which the legislation created as a "regulatory and quasi-judicial agency of the State." The Commission consists of three members appointed by the Governor with the confirmation of the Legislature; they serve for terms of four years. The Commercial Fisheries Entry Commission is distinct from the Board of Fisheries and the Department of Fish and Game, though its relationship with these agencies is cooperative.

The legislation grants fifteen separate powers to the Commission, though these may be summarized in its central purpose, that of issuing permits to operate commercial fishing gear in Alaska's fisheries. As of January 1, 1974, a permit from the Commission is required in order to operate gear in any of Alaska's fisheries. Since 1978 the Commission has also been charged with the task of licensing commercial fishing vessels.

In creating the Commission, the Legislature granted it broad authority to adopt whatever regulations may be necessary to establish its own procedures and to implement the limited entry

program. The Commission also has the authority to conduct hearings and, in its "quasi-judicial" role, administer oaths, issue subpoenas and petition a court to enforce its subpoenas. The decisions of the Commission, as well as its procedures, are of course subject to judicial review.

The Commission issues two types of permits: interim-use permits and entry permits. Interim-use permits are issued for fisheries in which entry is not limited. For a nominal fee, any individual capable of operating gear in the fishery may secure an interim-use permit. Entry permits are issued for fisheries in which the total quantity of gear is limited and are issued only to those who qualify under the criteria of an elaborate scheme which we will discuss below.

The permit regulates gear directly, and people only indirectly. The permit holder may be assisted in the operation of his gear by others who do not hold permits, and one individual may hold more than one permit for using different types of gear, for fishing in different areas, or for fishing for different species. The holder of the permit, however, must be present and actively engaged in the fishing operation while the gear is in use.

Required Use

Unlike a license, an entry permit must be used. If it remains unused for a period of two years the holder must forfeit it to the Commission. Moreover, it must be used by the holder of

the permit. The legislation allows for the transfer of an entry permit only temporarily and only under emergency conditions such as illness, required military service, or damage to the vessel at mid-season, which prevent the holder from operating his gear.

Required use of the entry permit is a necessary component of the management scheme; the quantity of gear bears a relationship to the quantity of the catch, and it is in the interest of the state that the total allowable catch be harvested. It is necessary also from a social standpoint. An entry permit, once issued, pertains to the holder (owner) and assumes the status of quasi-property. It may be sold to another seeking entrance to the fishery; upon the death of the holder it becomes a part of his estate and may be passed to his heirs. The legislature required that the permit holder be actively engaged in its use because it intended that the permits be held by fishermen, and not by speculators or absentee-landlords. Consequently permits may not be leased, attached or sold on execution of judgment as the result of a court decision. Nor may the entry permit be mortgaged, except that a fisherman may receive a loan through the state's Fisheries Enhancement Loan Program or from the state's Commercial Fishing and Agricultural Bank in order to purchase an entry permit, and he may use the permit itself as collateral for the loan.

Transferability

Entry permits may be sold only in accordance with procedures established by the Commission. The seller must notify the

Commission of his intent to sell 60 days prior to the transaction, and the transfer must take place within a year of the notice of intent. This delay serves two purposes: first, it provides for a "cooling off" period designed basically to protect the buyer and seller from themselves, so that neither enters hastily into an irreversible transaction; second, the delay period allows the Commission to determine that the buyer has the ability to participate actively in the fishery.

In the event that the outstanding number of entry permits is greater than the optimum number for a particular fishery, the seller may sell his permit only to the Commission under buy-back provisions which we will discuss below.

Optimum Limit

The task of the Commercial Fisheries Entry Commission is a lengthy and continuous process. The fisheries of the state are under continuous review to determine whether it is necessary for the health of the fishery to begin issuing entry permits, rather than interim-use permits. Once the decision to limit entry to the fishery is made, the administrative procedures necessary to implement this decision are necessarily time consuming. Two years passed between the enactment of the legislation and the issue of the first entry permits for the nineteen salmon fisheries for which entry was limited. Since then, more fisheries have been included in the limited entry scheme, and others will be added in the future.

The Commission's first task was to divide the state's fisheries into administrative areas "suitable for regulating and controlling entry into the commercial fisheries." After establishing these areas, the second task was to establish the "maximum number" of permits and the "optimum number" of permits for each fishery. The goal of the legislation is to achieve the optimum number, defined as:

> (1) the number of entry permits sufficient to maintain an economically healthy fishery that will result in a reasonable average rate of economic return to the fishermen participating in that fishery, considering time fished and necessary investments in vessels and gear;
>
> (2) the number of entry permits necessary to harvest the allowable commercial take of the fishery resource during all years in an orderly, efficient manner, and consistent with sound fishery management techniques;
>
> (3) the number of entry permits sufficient to avoid serious economic hardship to those currently engaged in the fishery, considering other economic opportunities reasonably available to them (AS 16.43.290).

It is worth noting at this point that the economic goal is to assure a reasonable <u>average</u> rate of return to the fishermen. Nothing in the limited entry management scheme serves to guarantee each fisherman a reasonable income. Their incomes will vary considerably bcause some will make a greater effort than others, and some will be more successful than others.

The maximum number of permits is essentially the number of gear units operating in a fishery; it is significant only if it exceeds the optimum number. The state legislature, however, considered the problem which limited entry addressed to be urgent,

and realized that the determination of the optimum number of permits would require considerable research and time. The Act therefore provides that the Commission could designate as "distressed" those fisheries in which it estimated that the number of gear units in operation would be greater than that reflected in the optimum number of permits when it eventually determined this latter number. For these fisheries, the legislature set the maximum number of permits at "the highest number of units of gear fished in that fishery during any one of the four years immediately preceding January 1, 1973."

Distressed Fishery

The designation of "distressed fishery" was necessary in order for the process of limiting entry to begin immediately upon enactment of the law. For fisheries not designated "distressed" initially, the Commission establishes the maximum number of entry permits when it determines that the fishery has reached levels of participation "which require the limitation of entry in order to achieve the purposes of this chapter."

Throughout the initial administrative period the Commission issued interim-use permits for all fisheries to anyone capable of actively participating in the fishery, except that the legislature declared in the Act itself that three fisheries, the drift gillnet fisheries in Bristol Bay Cook Inlet and Prince William Sound, were "economically impaired." For these it stipulated that interim-use permits would be issued only to those who held gear licenses prior to January 1, 1974.

When the limited entry legislation was enacted in 1973, there were already numerous salmon fisheries in which the maximum level of gear units operating exceeded the optimum level. Moreover, the extent of the fishing effort of the participants varied greatly, ranging from small operations by fishermen who held full time occupations in other fields and fished commercially occasionally, to those who depended upon the fishery for their entire livelihood. Thus the diversity of fishing patterns and multiplicity of participants made it clear to the legislature that when the Commission reached the state of actually issuing entry permits, the number of applicants was going to exceed the maximum number of permits established. The Act therefore contains provisions regarding the sensitive and controversial issue of which of the past participants are going to be excluded from the fishery.

Eligibility Standards

Once the maximum number of entry permits for a fishery is determined, the Commission establishes a system for ranking applicants for the permits "according to the degree of hardship which they would suffer by exclusion from the fishery." The Act directs the Commission to base this ranking upon (1) the degree of economic dependence upon the fishery (including such data as percentage of income, investment in gear and availability of alternative occupations) and, (2) the extent of the applicant's past participation in the fishery.

When the Commission does begin accepting applications in a

fishery newly desginated for limited entry, applicants are limited to those who hold interim-use permits to operate gear in the fishery. As the law initially read, the provision limited application for the first entry permits to those who held gear licenses before January 1, 1973, but this stipulation was struck down by the Alaska Supreme Court (Isakson v. Rickey, 1976) on the grounds that it discriminated against fishermen who obtained gear licenses after that date, but before the Commission began accepting applications. The court upheld, however, the stipulation in the Act that in determining the degree of hardship which a fisherman would suffer by exclusion from the fishery, the Commission could base its determination on the fisherman's economic dependence on the fishery as of that date. In a later decision (Commercial Fisheries Entry Commission v. Apokedak, 1980) the same court ruled that the gear license requirement itself does not violate the equal protection clause of the constitution.

With the application form, an applicant is required to submit documents establishing past participation and past economic dependence on the fishery (e.g., income tax records, bills of sale, old fish tickets, etc.).[7] On the basis of this evidence, the Commission ranks applicants according to a point system which divides them into two categories: those who would suffer significant economic hardship by exclusion, and those who would suffer minor economic hardship. The point system also serves to rank applicants within each category.

If an applicant is dissatisfied with the priority accorded to him by the Commission, he is entitled to an administrative hearing in which he may voice his objections and provide further evidence. And of course, the Commission's decisions are subject to appeal in the state courts. When the Commission issues permits for a fishery, a portion of the maximum number is withheld if appeals by fishermen concerning their priority are still pending.

In issuing the permits, the Commission proceeds from those in the highest category of priority to applicants in the lowest priority category, until the maximum number of permits has been issued. Permits in the lowest priority category are distributed by lottery among those applying.

Variation in Optimum Number of Permits

The authors of the limited entry program intended the optimum number of entry permits to be a stable figure that would not vary according to annual fluctuations in catch or market conditions (as commercial fishing regulations are). For this reason the Act provides that revisions in the optimum number may be made only after the determination of "established long term changes" in the biological condition of the fishery or the market conditions.

Likewise, the reduction from the maximum number of entry permits to the optimum number provided for in the Act is intended to be a slow process, accomplished more or less by attrition. In fisheries where the maximum number of permits exceeds the optimum

number, a permit holder desiring to leave the fishery may sell his permit only to the Commission. For this purpose the Act directs the Commission to establish a "buy-back fund" financed through annual assessments on holders of entry permits (not more than 7% of the gross value of the catch). These funds are used to purchase, at market value, the permits of those leaving the fishery. The Commission does not reissue these permits.

In two amendments to the Limited Entry Act, the legislature established two special categories of entry permits which are issued to entities, rather than individuals: Educational permits issued to institutions accredited by the Department of Education or Commission on Post-Secondary Education, and Special Harvest Area Permits to "holders of private, non-profit hatchery permits issued by the Department of Fish and Game." Entry permits issued in these categories do not figure into the determination of the maximum or optimum number.

Enforcement Aspects

From a law enforcement standpoint, the introduction of entry permits into the documentation scheme simply provides the enforcement officer with an additional item to monitor. The Act is enforced by the Division of Fish and Game Protection of the Department of Public Safety. Penalties for violations include fines (up to $10,000) and the mandatory forfeiture of a permit upon conviction for a third offense. A fisherman who loses his permit through forfeiture may not reapply for a period of three years. The Act provides similar penalties for applicants making

false statements or representations during the application process.

Evaluation of Limited Entry

As of 1982, it is too early to assess accurately the impact of the limited entry program, or even to determine whether or not it has accomplished its intended purpose. Those who hold permits generally support the program and the income levels of fishermen in these fisheries have seen significant improvement over average incomes before the program went into effect. In the Governor's Study Group on Limited Entry, the authors noted that the facility of obtaining financing for purchasing gear or of leasing gear enabled many individuals who held full-time positions in totally unrelated fields to engage in commercial fishing on a casual or part-time basis. Limited Entry has undoubtedly served to exclude most of these fishermen from the fishery,because the expense of an entry permit renders their participation no longer viable. In 1974, a person desiring to operate gear in the Bristol Bay drift gillnet fishery could do so by purchasing a nominal licensing feee. In 1979 the market value of an entry permit for that fishery was approximately $65,000.[8] Permit values vary widely according to the fishery and type of gear authorized, ranging from a few thousand dollars to the tens of thousands. The price will vary according to the value in economic terms of the rights conferred.

A 1979 legislative report on the impact of limited entry on the Bristol Bay area noted a number of potential drawbacks to the

program.[9] Perhaps the most serious of these was the effect that the program has had upon young people in the local communities bordering the fishery, especially those who were going through their apprenticeship as crewmen at the time of the enactment of the law, and thus were not permitted to apply for entry permits initially. Many of these fishermen, the report noted, are now excluded from the fishery for economic reasons.

Indian Fishing Rights[10]

In revolutionary times and continuing for the first century of the history of the U.S., the federal government followed a policy of treating Indian tribes as sovereign nations encouraged to coexist peacefully under its protection. This status had, and has today, a profound effect on the question of Indian fishing rights. As sovereign nations, Indian tribes negotiated treaties with the federal government which in theory have the same force as treaties between the U.S. and a foreign nation.

In 1871 Congress changed this policy with a declaration that thereafter no Indian tribe or nation within the U.S. should be recognized as an independent power with whom the U.S. could enter treaties (16 U.S. Stat 566), but this declaration had no effect on existing treaties or non-treaty agreements formulated after that date. Nor does it have an effect on non-treaty and non-documented fishing rights which courts have recognized as belonging to Indians by virtue of aboriginal use.

There are, then, three sources of origin of Indian fishing

rights: (1) by virtue of the ownership of reservations established by treaty, (2) by virtue of treaty specifications regarding fishing rights off the reservation, and (3) rights which the courts have recognized as belonging to Indians by virtue of their aboriginal use of the resource.

The existence of these "special" rights has implications on the question of jurisdiction and the state's authority to regulate fishing by Indians, both on and off the reservation, and, as we shall see, this authority or lack of authority has serious ramifications on the activities of the commercial fisherman.

The courts have in many cases been ambiguous and sometimes contradictory on questions regarding Indian fishing rights, but there seems to be a consensus that on formally established reservations, the Indian tribe, as sovereign power, has the exclusive right to control hunting and fishing. In 1953 Congress enacted legislation which extended state criminal and civil laws to certain Indian reservations, but this legislation expressly excluded hunting and fishing laws:

> Nothing in this section . . . shall deprive any Indian tribe, band or community of any right, privilege, or immunity afforded under federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof. (18 USC § 1162)

Numerous court decisions have sustained this right, and Congress has recognized it in legislation awarding compensation for damage done to Indian fishing grounds as a result of development. For instance, when Congress authorized construction of the

Dalles Dam in Oregon, it paid the Yakima Indians $15,000,000 for the loss of treaty fishing rights on their reservation above the dam. In a U.S. Supreme Court case involving Alaskan Indians (Metlakatla Indians v. Egan, 1962), the court stated that the exclusiveness of Metlakatla fishing rights "was a part of the reservation as created in 1891 and clarified by the proclamation of 1916, which excluded others from fishing in Metlakatla waters."[11]

The tribal authority thus has the power to regulate fishing on Indian reservations. It may of course permit fishing by non-Indians if it chooses to do so, but as a general rule it is immune to state fishing laws and regulations.

The power of the Congress, without providing compensation, to superimpose regulation over Indian fishing on reservations is more ambiguous. It seems clear that Congress has the authority to enact legislation regulating fishing, even in contradiction of treaty provisions, but only for the purpose of conservation. In a 1961 Supreme Court decision (Maka Tribe v. U.S.), the court ruled that while fishing rights could not be cut off altogether, they could be limited by reasonable conservation regulations promulgated by the federal government, without giving rise to a claim for compensation. The court reaffirmed this position in Metlakatla Indians v. Egan, supra, holding that Congress had given the Secretary of the Interior the power to regulate Metlakatla fishing rights for conservation purposes. In general, however, the federal government has been exceedingly cautious in

exercising this right. Normally, regulations concerning the conservation of the resource on the reservation are left to the tribal authorities.

Off-Reservation Rights

The question of Indian fishing rights off the reservation is also ambiguous, and of more significance to the general fisherman and accordingly a major potential source of conflict. In general, the treaties negotiated between the federal government and the various Indian tribes involved a cession of land by the Indians to the U.S. in return for a grant of sovereignty over other land (the reservation) and an additional grant of perpetual rights to hunt and fish on the land ceded. At the time of the negotiation of these treaties, the right to hunt and fish was unimportant to the white settlers, who were more interested in farming and for whom game supplies seemed unlimited but in modern times these rights have become of greater interest due to the exhaustion of such resources.

By extension, federal courts have recognized these rights even in cases where they are not expressly covered by treaties. For example, in Tlingit and Haida Indians v. U.S. (1959), Indians claimed entitlement to compensation for land owned aboriginally. In its decision the court directed that the Indians were entitled to such compensation and further specified that the value of fishing rights be considered in determining the value of the land.

It is the expressed guarantees of off-reservation fishing rights that have caused the most problems for states in their attempt to exercise jurisdiction over Indian fishing. In a brief survey such as this, we can not go into all of these treaties, but we might cite the "Stevens treaties," negotiated in the 1850's by the territorial governor of Washington (a federal agent), Isaac Ingalls Stevens, with Indian tribes in the area of Washington state, as exemplary.

In these treaties the Indians ceded land to the white settlers but retained a degree of control over the fishery resources of the territory. The treaties stated that:

> The right of taking fish, at all usual and accustomed grounds and station, is further secured to said Indians in common with all citizens of the Territory [of Washington], and of erecting temporary houses for the purpose of curing with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.

Federal court decisions over the past century have been ambiguous and at times contradictory in interpreting the "perpetual" significance of such treaties. In the 19th century, the Supreme Court (Ward v. Race Horse, 1896) ruled that these special fishing rights were subject to regulation by the state. Later decisions, however, served to reverse the effect of this decision. In Tulee v. Washington (1942), the court ruled that although the state could exercise some regulatory authority over Indian fishing off the reservation, it could not require Indians to purchase a fishing license.

In 1951, the Ninth Circuit Court ruled that off reservation hunting and fishing is subject to state regulation (Makah Tribe v. Schoettler), but only to the extent actually necessary for conservation purposes. By "necessary," the court implied that the state may restrict Indian fishing, guaranteed by treaties such as the Stevens treaties, only if the restriction of the activities of non-Indians will not achieve adequate conservation. But a later ruling in federal court (State v. Arthur, 1953) held that Indians are wholly exempt from state regulation when off reservation hunting and fishing rights are guaranteed by treaty.

These three cases provided the ambiguous guidelines under which states operated for many years: the Ward decision that the state could regulate Indian fishing, the Schoettler case limiting the states' authority to regulate to the extent necessary for conservation, and the Arthur viewpoint which exempted Indians from regulation by the state. A more recent decision by the Supreme Court, however, seems to sustain the view expressed in the Arthur decision, and since this case involves the Stevens treaties and had a profound impact on commercial fishermen in the area of the state of Washington, it is worthwhile to examine it in some detail.

The Boldt Decision

In 1974 the U.S. brought a suit in federal district court in the state of Washington on behalf of fourteen Indian tribes which had negotiated treaties with Territorial Governor Stevens. In the suit the government contested the state's authority to regu-

late net fishing for salmon by Indians in the Columbia River and its tributaries.

The court's decision was decidedly in favor of the Indians. Judge George H. Boldt ruled that Washington state fishing regulations were unlawful when applied to members of the Indian tribes. The rights of Indians to fish, the judge ruled, were guaranteed by treaties, and could not be regulated except when it was necessary to preserve stocks. Moreover, regulation for conservation purposes was left to tribal authorities. The court ruled that the state could intervene only if tribal conservation measures were determined by the court to be inadequate.

The state of Washington appealed Judge Boldt's decision to the Supreme Court, and though the latter disagreed with some to the technicalities of the lower court's decision, it left the resulting provisions intact.

The ramifications of the Boldt decision on the question of state jurisdiction over Indian fishing are far-reaching, but the immediate impact of the court's interpretation of the treaty language was of far greater significance to the commercial fisherman. In reading the Stevens treaties, the court interpreted the Indians' right to share the resource "in common with all citizens of the Territory" to mean that the Indian tribes were entitled to 50% of the harvestable catch. As a result of this interpretation, fewer than 1000 Indian fishermen held the claim to half of the Puget Sound catch of salmon, while more than

6000 non-Indian fishermen were limited to the other half of the catch.

Numerous non-Indian fishermen were driven from the fishery by Judge Boldt's decision, and in 1980 Congress recognized this inequity in the "Salmon and Steelhead Conservation and Enhancement Act," which includes provisions for compensating fishermen who suffered economic losses as a result of the court's decision.

Judge Boldt's decision may have far-reaching effects on commercial fishing in the U.S., but its effect on the question of Indian fishing rights in the state of Alaska is unknown. The Alaska Native Claims Settlement Act, passed by Congress in 1971, purports to settle finally the aboriginal claims of Alaskan Natives including claims of hunting and fishing rights. The Act provides for compensation with a complex system of monetary and land entitlements, but it includes a clause addressing also claims in other areas:

> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to native use and occupancy, or that are based on the laws of any other nation, including such claims that are pending before any federal or state court or the Indian Claims Commission, are hereby extinguished. (42 USC § 3121)

This settlement may thus be considered total and final, and reduces the question of off-reservation Indian fishing rights within the state of Alaska to an historical problem. However, it

is not clear in 1982 whether at some time Alaska Natives may claim some types of regulatory authority with respect to land and associated water which is owned by Native organizations pursuant to titles established under the Settlement Act.

Alaska State Laws: Subsistence Fishing

As we mentioned above, Congress considered the Alaskan Native Claims Settlement Act to be final, and as a result of the provisions of this law, claims regarding special Indian fishing rights in the state will be sharply delineated. Apart from the special rights of the Metlakatla Indians on their reservation in Southeast Alaska, Alaskan Natives have as yet asserted no special claim to priority in access to the state's fishery resources.

Federal and Alaskan laws do, however, recognize a special category of resource user, Native and non-Native, in the provisions relating to subsistence hunting and fishing.

The subsistence category is basically a classification of the needs of the user and the use made of the catch. Alaska statutes define this classification on the basis of historical criteria:

> "Subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption. (AS 16.05.940)

Alaska passed this law in part to reflect the subsistence title of the Alaska National Interest Lands Act which requires

the Secretary of the Interior to establish a subsistence scheme using these definitions if the state does not which would apply to fish and game on all federal land in the state.

The law thus recognizes a life style characterized by a special relationship with a special dependency upon the state's fishery resources.

A sensitive aspect of the question of subsistence fishing and hunging rests upon the fact that state laws define subsistence uses as the priority use of the fishery resources, placing these users at the head of the line when decisions must be made regarding the division of a limited catch among the competing interests desiring to harvest this catch: the commercial fisherman, the sports fisherman, and the subsistence user.

The priority assigned to subsistence fishing is reflected in a "Statement of Intent" by the state legislature, and reaffirmed in a "Policy Statement on the Subsistence Utilization of Fish and Game" by the Board of Fisheries:

> Legislative Intent. The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents.
>
> Policy Statement on the Subsistence Utilization of Fish and Game. The Board of Fisheries recognizes that existing cultures and life styles in Alaska are of great value and should be preserved. Accordingly, customary

and traditional subsistence uses of fish and game are assigned a priority among beneficial uses.

Since subsistence is a priority use of the resource based upon reasons which are largely historical, the question of determining which of the state's citizens may qualify for permits to subsistence fish is of paramount importance. The Board of Fisheries makes this determination on the basis of three criteria:

(1) historical dependency on the fishery resource "as a mainstay of one's livelihood,"

(2) local residence, and

(3) the availability of alternative resources.

These criteria reflect in part the intention of the lawmakers that recognition of the subsistence use of fishery resources be basically a rural phenomenon. The subsistence use of the resource is related to the specific fishery, and obviously can not be claimed by individuals who do not reside near the fishery. Nor can the right be claimed in urban areas where as a result of development alternative resources are readily available and have replaced the subsistence life style.

Though subsistence use is assigned priority in the state's scheme of fishery management, it is not an unlimited or unregulated use. The state, through its Board of Fisheries, reserves for itself the final decision regarding the extent of dependency and history of need of the user though regional boards have a first opportunity. As had been the case with the limited entry

program, opponents of the subsistence priority pattern established by the law launched an initiative drive to abolish the program. The drive against limited entry was rejected at the poles and was not renewed. As this went to press, repeal of the subsistence program was still to be considered by the voters. Repeal of the program means that the federal government will establish its own subsistence program and the state legislature will not be able to address the issue for at least two years.

The Board also promulgates regulations which have the force of law specifying gear types, seasons and area closures, as well as season and daily bag limits by species.

Federal Jurisdictional Legislation

Several pieces of federal legislation concern questions of federal jurisdiction and, by extension, state jurisdiction affect the process of law enforcement within the fishing industry. These laws, which include the Submerged Lands Act, the Outer Continental Shelf Lands Act and the Assimilative Crimes Act, treat issues of jurisdiction in both senses of the term -- jurisdiction as authority over a particular geographic area and jurisdiction over a particular topic, class of people or style of legal action.

Submerged Lands Act

The Submerged Lands Act of 1953 grants to the individual states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States and the natural

resources within such lands and waters. . . ." (43 U.S.C. § 1311). The legislation also awards to the states the right to "manage, administer, lease, develop and use" these lands and their resources in accordance with applicable state laws. (The provisions of the Act were extended to Alaska at the time of statehood.)

The term "lands beneath navigable waters" refers to --

> [A]ll lands within the boundaries of each of the respective States which are covered by nontidal waters. . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; [and] all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State. . . [and] all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters. . . ." (43 U.S.C. § 1301)

Nothing in the Act affects a seaward boundary beyond three miles if the boundary were so established at the time of the state's admission to the Union.

Jurisdiction over the seabed and subsoil and the resources of that portion of the continental shelf lying seaward of these "lands beneath navigable waters" is retained by the federal government. Moreover, within the three mile area itself the federal government retains its constitutional authority over navigation, interstate commerce, defense and international affairs.

In addition, those lands to which the federal government has acquired title, even if they lie within the three mile area spec-

ified by the Act, are excepted from state control as are any lands held by the United States for the benefit of Native Americans.

Litigation subsequent to the Submerged Lands Act has confirmed the power of the individual states to regulate coastal fisheries, in the absence of conflicting legislation under the commerce clause of the constitution.

Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act, provides for U.S. jurisdiction over all artificial islands and fixtures erected on the outer continental shelf (beyond the three mile limit) "as if the outer continental shelf were an area of exclusive Federal jurisdiction located within a State. . . ." (43 U.S.C. § 1333). However, if there is no conflict with existing federal laws and regulations the civil and criminal codes of the adjacent state are applicable to that portion of the outer continental shelf which would be part of the state if its boundaries were extended seaward. This provision for limited application of certain state laws in no way entitles the individual state to claim any of the resources of the outer continental shelf nor to apply taxation laws in this area.

In addition to defining the areas of state and federal jurisdiction and authority over the resources of the seabed, the Act contains other provisions relating to federal administration of oil, gas and mineral leases on the outer continental shelf.

Primary responsibility for administration of the Act belongs to the Secretary of the Interior, and original jurisdiction for disputes arising from its implementation lies with the U.S. district courts.

Further legislation -- the Outer Continental Shelf Lands Act Amendments of 1978 -- also deals with the resources of the shelf and, by extension, with fishing. This legislation, enacted in recognition of the growing need for offshore mineral exploitation and of the likely impact of such exploitation on fishing, establishes procedures for dealing with offshore oil pollution damage. It also provides for an oil pollution compensation fund and a fishermen's contingency fund.

The Act requires private operators and owners of vessels and offshore drilling facilities "to establish and maintain. . . evidence of financial responsibility sufficient to satisfy the maximum amount of liability to which the owner or operator of such vessel would be exposed. . . ." (43 U.S.C. § 1815). The legislation also defines the conditions and extent of liability.

The oil pollution compensation fund is designed to cover economic loss resulting from spills which is otherwise uncompensated or only partially compensated. The Act establishes specific procedures for the administration of the fund, which is under the Secretary of Transportation, and for the presentation of claims.

Claims against the fund or private owners or operators for economic loss resulting from oil spills may include the

following:

(1) removal costs; and

(2) damages, including

(A) injury to, or destruction of, real or personal property;

(B) loss of use of real or personal property;

(C) injury to, or destruction of, natural resources;

(D) loss of use of natural resources;

(E) loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; and

(F) loss of tax revenue for a period of one year due to injury to real or personal property.

(43 U.S.C. § 1813)

The Fishermen's Contingency Fund, also established by this legislation, provides compensation for --

> damages, or loss of, fishing gear [caused by] materials, equipment, tools, containers, or other items associated with oil and gas exploration, development, or production activities in such area, whether or not such damage occurred in such area.

(43 U.S.C. § 1843)

The existence of this fund does not diminish the liability of private parties for such damage, but rather, like the oil pollution compensation fund, provides for reimbursement for otherwise uncompensated losses.

The legislation also establishes procedures for administration of the fund, a responsibility of the Secretary of Commerce.

Assimilative Crimes Act

The Assimilative Crimes Act of 1940 (18 U.S.C. § 13) fills gaps in the federal criminal code applicable to federal enclaves by making punishable those crimes committed in a federal enclave which would be punishable under the state code of the individual state in which the federal area is located. In other words, in the absence of conflicting federal standards a state's criminal code is applicable in those areas which are otherwise under federal jurisdiction. However, if applicable federal laws do exist they supercede state law. Moreover, if federal and state penalties for a particular offense differ, the federal one is applicable.

Conservation Legislation

Conservation legislation in recent decades has affected the fishing industry. The interdependence of various species within the ecosystem has made the effect of animal protection legislation felt in areas beyond its immediate application. Thus, for example, laws prohibiting the killing of porpoises can interfere with the most economically efficient fishing procedures, even though the needs of the fisherman are taken into account as the legislation is written or as it is implemented. This problem of conflicting interests, in all probability, will grow as more information on the biological systems of the world becomes available. Currently, those conservation acts most related to fishing in the North Pacific include the Fish and Wildlife Coordination Act, the Endangered Species Act, the Marine Mammal

Protection Act and the Migratory Bird Treaty Act.

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act is a broad, far-reaching piece of legislation which has resulted in federal and state involvement in a variety of wildlife conservation activities. In its declaration of purpose the Act authorizes the federal government

> to provide assistance to, and cooperate with, Federal State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, public shooting and fishing areas, including easements across public lands for access thereto. . .[and] to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States. . . .

(16 U.S.C. § 661)

Perhaps the most important effect of this act on the fishing industry stems from its requirement that any agency of the United States government or any private or public agency acting under federal permit requirements which seeks in any way to modify or control a body of water must first consult with the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce. Upon such consultation NOAA, acting in conjunction with appropriate state agencies, investigates the environmental impact of the proposed project and submits its recommendation to the department or agency empowered to approve the project. This department must then consider the recommendations of NOAA and

make necessary adjustments in the project plan to accommodate wildlife conservation measures. These measures may include the acquisition of land by the federal government in order to ensure the preservation of the wildlife potential of the project area.

The Fish and Wildlife Coordination Act also provides for the expansion of the national system of wildlife refuges and for the administration of these refuges. The Secretary of the Interior, through the Fish and Wildlife Service, has the authority to acquire new lands for a refuge and to dispose of property no longer needed for refuge purposes.

The legislation prohibits certain activities on these national wildlife refuges:

> No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System; or take or possess any fish, bird, or mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law proclamation, Executive Order, or public land order. . . . (16 U.S.C. 668)

As indicated, subsection (d) of the same section modifies somewhat this prohibition:

> The Secretary [of the Interior] is authorized. . . to permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established . . . . (16 U.S.C. 668)

The Act further provides that within the national refuges the regulations permitting hunting and fishing shall conform as closely as possible to state fish and wildlife laws and regulations.

Authorized agents of the Secretary of the Interior (generally agents of the Fish and Wildlife Service) are empowered to enforce regulations on the refuges. Such an agent may, without a warrant, arrest any person who violates the regulations in his presence or view and may, with a warrant, search for and seize any material taken or possessed in violation of the regulations.

Marine Mammal Protection Act (1972)

The Marine Mammal Protection Act (1972) establishes a general moratorium on the taking of marine mammals (including sea otters and polar bears) within the zone of U.S. jurisdiction. At the time of the enactment of the law, this zone included the territorial sea and the contiguous zone established by Congress in 1966 (that is, extending twelve miles from the U.S. coasts). In one of the miscellaneous provisions of the Fisheries Conservation and Management Act, Congress amended the Marine Mammal Protection Act to extend the zone of jurisdiction to include the entire Fisheries Conservation Zone (FCZ).

In enacting MMPA, Congress established the conservation of the various species of marine mammals as its primary purpose:

> (1) Certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.

(16 U.S.C. § 1361)

The goal of the Act is to restore and maintain stocks of marine mammals at the "optimum sustainable population" level, considering the ability of the animals' habitat to support their sustenance.

Care should be taken to distinguish between the "optimum sustainable population level" and the "optimum sustainable yield" which we discussed with respect to fishery management schemes. The former concept relates to conservation only; in its most general sense, the Marine Mammal Protection Act does not foresee or provide for any commercial yield from these species.

The Moratorium established by the Act mandates a complete cessation of the taking of marine mammals. Moreover, the Act contains landing law provisions which prohibit the importation into the U.S. of all marine mammals and marine mammal products. These import provisions include fish caught commercially beyond the zone of U.S. jurisdiction if they were caught utilizing fishing techniques which result in an excessive incidental catch or kill of marine mammals.

Besides the landing law provisions, the Act asserts the authority of U.S. flag state jurisdiction under international law to prohibit its citizens or vessels from taking species of these animals on the high seas (except as provided for by international

treaty). Mere possession of marine mammals or marine mammal products is made an offense by the Act, and commercial fishing techniques designed to minimize the catch of marine mammals in the course of fishing operations will be applicable to all U.S. citizens, on the high seas as well as in the FCZ.

Responsibility for the implementation and enforcement of the Act is divided between the Department of Commerce (NOAA) and the Department of Interior (U.S. Fish and Wildlife Service). These two agencies have effected such a division by species, depending on each agency's history of involvement in the regulation of the species. NOAA assumes primary responsibility for whales, dolphins, porpoises and seals; the U.S. Fish and Wildlife Service is responsible for the management of polar bears and walrus.

Notwithstanding the Congressional assertion that the cessation of taking these species was to be "complete," the Act provides for a number of significant exceptions to its provisions. These exceptions fall into five general categories, of which the first is the taking of marine mammals for scientific research or public display (i.e., for zoos).

Commercial fishermen are granted a very limited exception to provide for the taking of marine mammals incidental to their operations. This provision was inserted primarily for the benefit of tuna fishermen whose incidental catch and distruction of porpoises is a source of major public dissatisfaction. The Act provided for a two year transitional period in which there would

be no limitation on the number of marine mammals taken during these operations, but it mandated that the Secretaries (of Commerce and Interior) undertake research to devise commercial fishing techniques which would minimize the incidental catch or kill of these species, and establish regulations to implement these techniques. The authors of the legislation assumed that, by virtue of research, after this transitional period the incidental catch of marine mammals in the course of commercial fishing operations would be reduced significantly:

> In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

(16 U.S.C. § 1371)

After the transitional period, the taking of marine mammals incidental to commercial fishing is subject to stringent regulation regarding both the number of each species taken or injured, and the fishing techniques employed.

Allowing for the possibility that, under favorable combinations of breeding and survival conditions, stocks of marine mammals could rise above the carrying capacity of their habitat anc thus cause extensive starvation or depredation of habitat. The Act permits the regulatory agencies to establish controlled harvests for conservation purposes if it should become necessary to reduce the size of the population.

Perhaps the most significant of the exceptions to the moratorium is that providing for the harvest of marine mammals by

Alaskan Natives. Recognizing that these species have traditionally played an important role in the culture and diet of Alaskan Natives, the Act exempts this group from its provisions. The exemption, however, is not total; Alaskan Natives, living on the coasts of the North Pacific or Arctic Oceans, are permitted to harvest marine mammals for subsistence purposes. Besides bodily sustenance, subsistence includes the "creating and selling of authentic [N]ative articles of handicrafts and clothing." Moreover, Natives may sell edible portions of the animals they take with the stipulation that such sales take place "in [N]ative villages and towns in Alaska or for [N]ative consumption." Articles of handicrafts and clothing made from marine mammal parts may be sold in interstate commerce.

The Act authorizes the regulatory agencies to limit the Native harvest of marine mammals if these agencies determine that stocks are depleted.

In the Act, Congress also provided for exceptions which are necessary in order to satisfy the terms and obligations of international treaties which the U.S. government has entered regarding marine mammals, such as the North Pacific Fur Seal Convention and the International Convention for the Regulation of Whaling.

Any taking of marine mammals as an exception to the moratorium requires a permit from the regulatory agency with jurisdiction over the particular species.

The net effect of the law, then, has not been to ban entirely

the taking of marine mammals, but rather to establish a highly regulated management scheme designed to minimize the harvest of these species in order to protect and conserve their population levels.

The Marine Mammal Protection Act grants the responsibility for enforcement to the Departments of Commerce (NOAA, National Marine Fisheries Service) and Interior (U.S. Fish and Wildlife Service), with these two agencies again dividing the task according to species. The discretionary powers granted to enforcement officers by the Act are typical of those granted enforcement authority over misdemeanants. Officers may make arrests, with or without a warrant, if the violation is committed in their presence or view. They may board and search vessels "with a warrant or other process, or without a warrant if he [the officer] has reasonable cause" to suspect a violation. If the officer discovers a violation in the course of an administrative search, he has the authority to make arrests and seize the gear and catch. Otherwise violators may be brought to court by citation.

Penalties for violations include fines of up to $10,000 for individuals, or up to $25,000 for vessels. The entire cargo of the vessel involved in the violation, including gear and catch, is subject to forfeiture. As federal offenses, cases tried in violation of the provisions of the Act are heard in the U.S. District Courts.

With its direct regulation of the catch by any person within the FCZ, its landing law provisions, and its assertion of flag state authority over U.S. citizens on the high seas, the act exerts the full force of U.S. jurisdiction over marine mammals possible under customary international law. In addition, Congress directed the Secretaries of Commerce, Interior, and State to initiate negotiations for bilateral and multilateral agreements for the protection and conservation of marine mammals, including negotiations regarding commercial fishing techniques with those nations whose activities interfere with the conservation and protection of marine mammals which at some point in their life cycle might live within the protected geographic area.

When the Act became law in 1972, many states already had laws regulating the marine mammals within their area of jurisdiction. Since the enactment of the Marine Mammal Protection Act, these laws have become subject to the review of the Secretary of Commerce, or the Secretary of the Interior. However, if these officials determine that the state's laws are consistent with the provisions of the federal act, state law may displace federal law on the subject. Moreover, the Act permits the implementation agencies to transfer management and enforcement responsibilities to individual states.

For instance, in 1973 the State of Alaska petitioned the federal government for management authority over nine different species of marine mammals important to its coastal residents. In 1976, the U.S. Fish and Wildlife Service yielded authority to the

state over only one species, walrus, but with a limitation of the annual harvest to 3000 animals. The state experienced difficulties of working within this limit, and was forced to establish a village quota system. Eventually, the state officials found these restrictions to be untenable and cumbersome, and so in 1979 the state returned the management authority over walrus to the federal government.[12]

Since maring mammal management and conservation is dependent upon the adequacy of information regarding each sepcies, its habitat, and impacts on the environment, the Act directs the implementing agencies to begin a program of research, and also authorizes these agencies to make research grants to outside entities and individuals for research purposes. In this research, special emphasis is given to the area of commercial fishing gear development, in particular, tuna gear which will minimize the incidental catch of porpoises.

The Act created a federal Marine Mammal Commission to oversee the general implementation of its provisions. Consisting of three members appointed by the President, the Commission is charged with reviewing existing international treaties, conducting research, making recommendations to the implementing agencies, and submitting periodic reports to Congress. In this task, the Commission is assisted by a Committee of Scientific Advisors on Marine Mammals consisting of nine scientists.

Migratory Bird Treaty

The Migratory Bird Treaty Act and the accompanying Migratory Bird Conservation Act (16 U.S.C. § 701 et. seq.) implement the terms of a network of treaties between the United States and Canada, Mexico, Japan and the Soviet Union. These treaties and the federal legislation provide for the protection and conservation of a broad range of bird species which are specifically listed in the treaties. Under the Acts it is illegal to take, kill or possess any of these birds except as permitted in regulations promulgated by the Secretary of the Interior. The Secretary has the authority to determine when and to what extent hunting, taking, possession or sale shall be permitted. His regulations reflect findings regarding the distribution, abundance, breeding habits, migratory patterns and economic value of the birds.

The legislation also establishes the Migratory Bird Conservation Commission. This commission, which includes the Secretaries of Interior, Agriculture and Transportation and designated representatives from the Senate and House, considers and advises upon the acquisition of land for use as wild bird sanctuaries. The Secretary of the Interior, as chairman of the commission, has the authority to purchase or lease such areas as have been designated as suitable for sanctuaries. The legislation authorizes appropriations for the acquisition and administration of these lands.

Although these Migratory Bird Sanctuaries are areas of

federal administration, the criminal and civil codes of the state in which the sanctuary lies are applicable as long as they do not conflict with federal law. Moreover, nothing within the federal migratory bird legislation prohibits the individual states from enacting additional regulations concerning the conservation and protection of migratory birds if these regulations do not conflict with federal law or with the provisions of the relevant treaties.

The Department of the Interior, acting through the Fish and Wildlife Service, exercises primary responsibility for the enforcement of the provisions of the migratory bird legislation. A duly authorized agent of the department may arrest, without warrant, any person violating the provisions of the Act in his presence or view and may execute any warrants issued by the proper authority to facilitate enforcement of the regulations.

Most violations of the legislation are misdemeanors punishable by a fine of not more than $500 and/or a prison sentence of not more than six months. However, the taking of a protected bird with the intent to sell or barter is a felony and carries a fine of not more than $2000 and/or a prison sentence of not more than two years. Any birds seized during the enforcement process and later found to have been taken or possessed in violation of the Act are forfeited to the United States government and disposed of by the courts. Moreover, equipment such as guns, traps, nets or vessels used in the taking or possession of birds with the intent to sell or barter may also be forfeited and

disposed of upon conviction of the individual involved.

The migratory bird legislation could have a heavy impact upon the conduct of the commercial fishing industry, although so far its effects are more potential than actual. Most of the seabirds of the North Pacific are protected under the legislation and the relevant treaties, but great numbers of these birds are regularly taken as incidental catch in those fishery operations which utilize nets. The incidental catch of these birds is a violation of the statutes but, in reality, is difficult to prevent if the net fisheries are to continue operation.

In addition, the Migratory Bird Treaty conflicts with customary takings by Eskimos of migratory birds in northern Alaska and Canada. For practical enforcement purposes both nations seem to have adopted an unwritten exception to the Treaty, rarely interfering with customary taking for personal and family consumption by these peoples (whose existence was scarcely acknowledged at the time of the initial adoption of the treaty).

Endangered Species Act (1973)

The Endangered Species Act (1973) is an omnibus bill. At the time of its enactment, numerous laws already existed protecting certain species or classes of animals whose stocks had been depleted. The Endangered Species Act represents an effort by the federal government to establish a unified administrative approach for the protection of all "species of fish, wildlife, and plants which have been so depleted in numbers that they are in danger of

or threatened with extinction" (16 U.S.C. § 1531). As such, the legislation covers a broad range of species, and is open-ended in scope to incorporate additional species if they are determined to be endangered.

Because of the multiplicity of species covered by the law -- fish, plants and animals -- responsibility for implementing the Endangered Species Act is divided among a number of existing agencies within the federal government. Primary responsibility is granted to the Departments of the Interior (U.S. Fish and Wildlife Service) and Commerce (National Marine Fisheries Service), but the Department of Agriculture plays a role regarding endangered plants, and the Department of the Treasury (U.S. Customs Service) is actively involved in implementing and enforcing the provisions regarding the import or export of the species covered by the law. All of these agencies operate under the umbrella of regulatory power vested in the Secretary of the Interior with respect to endangered species.

The first and central task mandated by the provisions of the Act is the compilation of the list of those species which are determined to be endangered. The registration of a species as "endangered" on this list sets in motion the protection provisions of the law. This list is compiled jointly by the Secretaries of the Interior and Commerce, who determine whether or not a particular species is endangered upon the basis of:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; or

(5) other natural or manmade factors affecting its continued existence.

(16 U.S.C. § 1533)

The procedures of this determination provide a mechanism for input from a variety of interested parties through public comment, cooperation with state agencies and with other agencies of the federal government.

Once it is determined that a species is endangered, the Act provides for the formulation of specific regulations designed to assure its protection. As with the determination itself, this process is frequently a joint effort, involving several branches of the federal government. Regulatory measures may include protection of the species' habitat, involving acquisition of land or water, establishment of refuges, etc.

The Endangered Species Act is, in the constitutional phrase, the supreme law of the land in the sense that it recognizes no obligation to divide jurisdiction with the individual states. But the law does authorize the federal government to enter cooperative management agreements with states, and, moreover, the federal government is authorized to transfer management authority entirely to a state or states provided that the latter's policies reflect the provisions of the law. Federal regulations preempt

state laws in the event the two conflict, except that when a determination is made that a species is endangered, states are granted a transitional period in order to make their laws conform to the federal criteria of protection. State laws protecting endangered species within their borders (including their territorial seas) may be more restrictive than federal protection regulations.

The Act also provides the federal agencies with the authority to enter bilateral and multilateral agreements with foreign governments regarding endangered species. Many such agreements already existed at the time of the enactment of the law, such as The Migratory Bird Treaty, but these agreements need not necessarily be in the form of treaties. They may provide for technical assistance or foreign aid for the purpose of establishing programs to protect endangered species.

Although the legislation grants broad discretion to the implementing agencies in the actual formulation of regulations, it also lists three general categories of actions which are explicitly prohibited. These include:

(1) the direct taking or destruction of endangered species within the U.S. or its territorial sea;

(2) the direct taking of these species by U.S. citizens on the high seas; and

(3) landing law provisions which prohibit the import, export, possession or transporting of endangered species within the U.S.

Enforcement of Endangered Species Act

To facilitate enforcement of the law, there is an added provision requiring that all persons engaged in the business of importing or exporting plants or animals, whether or not they are classed as endangered, obtain permits from the Secretaries of the Interior and Commerce and file reports on their import and export activities to these agencies.

As with the implementation of the Endangered Species Act, enforcement responsibilities are divided among those agencies with the most extensive history and capability of involvement with the particular species. Basically, jurisdiction is shared by the National Marine Fisheries Service (Commerce) and the U.S. Fish and Wildlife Service (Interior), though the Department of Agriculture has an interest concerning plants, and the U.S. Customs Service (Department of the Treasury) is involved with the enforcement of the landing law provisions regarding the import or export of these species.

The enforcement powers are exceptionally broad when they deal with provisions relating to the import and export of protected species. Enforcement officers may "detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation" (16 U.S.C. § 1540). Officers are empowered to execute search and arrest warrants, and they are also authorized to conduct searches and seizures without a warrant. In the case of violations, the illegal cargo (the endangered species) is subject

to forfeiture, as is all of the gear and equipment employed in its taking or transport (gear, traps, guns, vehicles, airplanes, vessels, etc.).

Civil penalties for violations of the provisions of the Act include fines of up to $10,000, and the law also provides for criminal penalties of imprisonment and fines totaling as much as $20,000. Violations of the provisions of the Act which occur "in the course of commercial activity" are defined as civil offenses.

The Endangered Species Act specifies two categories of exceptions to its provisions, one temporary and one permanent. A temporary exception is made in cases of economic hardship; if a person has already entered a contract with regard to the taking of an endangered species when it is first listed as endangered, he or she may fulfill the terms of that contract if failure to do so would result in undue economic hardship.

The permanent exception is much akin to that provided in the Marine Mammal Protection Act. Native Alaskans (or non-Native permanent residents of Native villages) are permitted to continue to take endangered species for subsistence purposes and for the manufacture of "authentic Native articles of handicrafts and clothing." Subsistence includes the sale of edible portions of the catch in Native villages, and the articles of handicraft or clothing may be sold in interstate commerce. Both of these exceptions are subject to regulation by the implementing agencies.

Conflicts between the Endangered Species Act and commercial fishing activities are more potential than real. There are a few actual conflicts, such as the taking of endangered species of sea turtles by shrimp fishermen in the Gulf of Mexico, but for the most part the fish listed as endangered are extremely small, fresh water species which in no way interfere with the commercial fisherman. The fisherman, however, should be aware of possible problems which could arise with the addition of new species to the list of those endangered. At the very least these new additions could force the fisherman to alter his fishing technique in order to avoid the incidental catch of endangered species. In a worst case situation, fishing for a targeted species would have to cease if the incidental catch of endangered species could not be eliminated from the fishing operation.

Fishermen and other users of the high seas also need to be wary of the definition of "taking" under the Act and the protection of habitat necessary to endangered species which is provided for under the Act. Seismic testing, for example, which might interfere with the breeding habits of an endangered species such as various whales, might constitute a "taking" for legal purposes.

Environmental Legislation

Various pieces of federal legislation in the area of environmental protection affect the fishing industry, either directly or indirectly. Ultimately, of course, any legislation which works to protect and enhance the marine environment touches upon the

concerns of fishermen, whether in the prohibition of sewage disposal into salmon spawning streams or in the regulation of the building of docks and the dredging of harbors. Three acts which have had an effect upon various aspects of the fisherman's world will be discussed here: the National Environmental Policy Act, the Clean Water Act, and the Coastal Zone Management Act.

National Environmental Policy Act

In 1969, recognizing a need "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment" (42 U.S.C. § 4321), Congress passed the National Environmental Policy Act. This legislation, and related executive orders asserting the need for federal leadership in the area of environmental protection, resulted in the establishment of the Environmental Protection Agency (EPA). In addition to expanding the role of the federal government in the environmental protection field, the legislation also resulted in the transfer to the EPA of certain activities which were previously the responsibility of other government agencies. Among these, the most important to the fishing industry were the functions performed by the Department of the Interior through the Federal Water Quality Administration.

The National Environmental Policy Act also established the Council on Environmental Quality, an executive body whose primary responsibility is to advise the President in the formation of national environmental policy.

Among the far-reaching effects of this piece of legislation has been the requirement that every recommendation or proposal for a federal activity or an activity conducted pursuant to a federal permit, which has a significant effect upon the environment, contain an environmental impact statement (EIS). This statement must include information on the following:

1. the environmental impact of the proposed action
2. any adverse environmental effects which cannot be avoided should the proposal be implemented
3. alternatives to the proposed action
4. the relationship between local short-term uses of man's environment and the maintenance and enlargement of long-term productivity
5. any invisible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented

(42 U.S.C. § 4332)

In preparing the environmental impact statement the individual agency or department which is proposing the project must consult with all other federal agencies which have jurisdiction or special expertise in the areas of the environment which will be affected by the proposed activity and must provide for state agency and public input.

The Environmental Protection Agency makes draft environmental impact statements available to the President, the Council on Environmental Quality and the public for comment. After a review process, the agency may formulate alternatives to the proposed activities if such are necessary to prevent environmental injury.

The effect of this environmental legislation on the fishing industry is obvious. If a proposed federal or permit activity will in any way affect the marine environment, this anticipated impact and its consequences must be noted in the environmental impact statement. The EPA must then seek to prevent or mitigate the harmful effects of the activity, thus working to preserve the marine environment.

Clean Water Act

The Clean Water Act of 1977 essentially comprised a series of amendments to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.). The original Act and amendments form an omnibus piece of legislation which deals with a multitude of water pollution problems. Only those provisions of the Act which most affect activity in the fishing industry will be discussed here.

The goals of Congress in enacting the legislation included:

1. elimination of the discharge of pollutants into navigable waters by 1985;

2. achievement by 1985 of an interim standard of water quality which protects fish and wildlife and provides for recreation in and on the water;

3. the prohibition of the discharge of toxic pollutants in toxic amounts;

4. the development of areawide waste treatment management planning processes;

5. provisions for federal financial assistance in the construction of publicly-owned waste treatment works, and

6. the emergence of a national research effort to develop the technology necessary to eliminate the discharge of pollutants into navigable waters, waters of the contiguous zone and the oceans.

These goals are to be pursued with recognition of the primary right and responsibility of the individual state to deal with pollution in its environs.

The Environmental Protection Agency is directed by the Congress to carry out this legislation and is responsible for developing, in conjunction with other federal agencies, the states and private interests, comprehensive programs for preventing, reducing or eliminating the pollution of navigable and ground waters. In the development of these programs due regard must be given to protection of fish, aquatic life and wildlife.

The EPA, in cooperation with the individual states and other federal agencies, is also responsible for the establishment of a water quality surveillance system. Such surveillance is to be conducted especially in conjunction with NOAA, NASA, the Geological Survey and the Coast Guard. In addition, the EPA is responsible for developing and publishing, in cooperation with appropriate federal and state agencies, criteria and standards for water quality based on the latest scientific knowledge.

In order to achieve its goals of water pollution control, the Act authorizes the establishment of a network of laboratory facilities throughout the country, including one in Alaska, and makes provisions for a variety of research projects. Among these is a joint effort on the part of the EPA and the Coast Guard to study oil pollution and to develop solid waste disposal equipment for vessels. The Act also authorizes the study of the effects of pesticides in waters and the problem of waste oil disposal.

The problem of oil pollution is dealt with at some length in the legislation. The law specifically prohibits, with some exceptions, the discharge of oil which may "affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976)" (33 U.S.C. § 1321). Penalties are established for violation, and provision is made for removal of discharges and for establishment of liability.

The Act authorizes a variety of grants for water pollution research, for the administration of pollution control programs, for the development of university-level training facilities and for the construction of waste treatment works all of which must be supported by appropriation, of course, if the legislation is to be effective.

To facilitate enforcement of established standards and guidelines, the Act establishes a program of permit issuance -- the

National Pollutant Discharge Elimination System. The provisions of the legislation make the issuance of permits to regulate the discharge of pollutants into bodies of water both a federal and state concern; the two branches of government are required to act in concert. In Alaska such permits are handled by the EPA and the Alaska Department of Environmental Conservation.

The EPA holds emergency powers under the Clean Water Act to bring suit in U.S. District Court to restrain immediately the discharge of any pollutants if evidence exists that such discharge presents a substantial potential hazard. Moreover, the agency is authorized to provide assistance in emergencies caused by the release of pollutants into the environment.

Coastal Zone Management Act

The Coastal Zone Management Act of 1972 seeks to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development. . . ." (16 U.S.C. § 1452)

Under the terms of the legislation "coastal zone" refers to "the coastal waters (including the lands therein and thereunder), and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes

transitional and intertidal areas, salt marshes, wetlands, and beaches" (16 U.S.C. § 1453). Each coastal state has the responsibility for developing adequate management plans for the area encompassed by the Act. Such plans must include: (1) a mechanism to coordinate the program with the local government; (2) assurance that the state has the legal authority to implement the program, and (3) provision for adequate consideration of the national interest in planning for facilities to meet requirements other than local in nature.

In 1982, wetlands regulations requiring permitting (and permitting the blocking) of any activities affecting lands classified as wetlands (regardless of ownership) contiguous to streams flowing into navigable waters were a major source of concern regarding the excessive reach of regulation.

These plans are subject to federal review and approval. To assist in the develoment of such plans the federal government makes both developmental and administrative grants available through the Department of Commerce. NOAA asumes primary responsibility for administering these grants and for guiding the states in the development of the coastal management plans. The activities of all other federal agencies must proceed in accordance with the accepted state plan and, moreover, any coast-related activity which requires a federal permit of any sort must undergo review by NOAA to ensure that it is in compliance with the plans.

The individual state, after its plan has been approved, also has the right to review all proposed licenses and applications for federal permits. If the state objects to a use proposal, the ultimate decision whether or not to uphold the state's objection lies with the Department of Commerce. The department may either concur with the state's objection and request changes in the proposed project or, if it finds that the proposed activity is consistent with the provisions of the Act or in the interest of national security, it may override the state's objection.

Since essentially all private and public coastal activities are subject to review under the terms of the legislation, the fishing industry is inevitably affected. Moreover, the importance of the act as a regulating force grows as development of offshore and onshore energy resources potentially conflicts with fishing and other activities.

FOOTNOTES

[1] G. Kevin Jones, "Freedom of Fishing in Decline: The Fishery Conservation Management Act of 1976 and the Implications for Japan," California Western International Law Journal, 11 (1981), 53.

[2] Fishery Management Plan for the Gulf of Alaska Groundfish Fishery. Anchorage, Alaska: North Pacific Fishery Management Council, 1979.

[3] For a more extensive summary of the arguments for and against the FCMA, see H. Gary Knight, Managing the Seas' Living Resources, pp.79-83.

[4] See, for instance, J. Crutchfield and G. Pontecorvo, The Pacific Salmon Fisheries (Baltimore: The Johns Hopkins University Press, 1969).

[5] A Limited Entry Program for Alaska's Fisheries. Governor's Limited Entry Study Group (Juneau, Alaska: 1973).

[6] For a discussion of both of these cases, see Justice Boochever's opinion in Commercial Fisheries Entry Commission v. Apokedak (Supreme Court of Alaska, Feb. 5, 1980).

[7] In litigation in Alaska Superior Court, an applicant claimed that the complexity of the application form and the sophistication of the record keeping requirements placed excessive demands on the educational level and business practices of the fisherman. In a consent decree, the Commission agreed to provide applicants with assistance in preparing their application. (See Gosuk v. Commercial Fisheries Entry Commission)

[8] 1979 Annual Report - Commercial Fisheries Entry Commission (Juneau, Alaska: 1979).

[9] J.A. Koslow. Limited Entry Policy and the Bristol Bay Alaska Salmon Fishermen: A Report Prepared for the Alaska State Legislature Based on a Survey Conducted in Summer, 1979 (Juneau, Alaska: 1979).

[10] Much of the material in this section is taken from C.A. Hobbs, "Indian Hunting and Fishing Rights," The George Washington Law Review, 32 (March, 1964), 504-532.

[11] Quoted in C.A. Hobbs, p.521.

[12] For a discussion of the period of walrus management by the state during this period, see D. Strickland, "The Eskimo vs. the Walrus vs. the Government," Natural History, 40 (Feb., 1981), pp 48-57.

PART III. The Governmental Agencies

To the fisherman the multitude of government agencies, state and federal which affect his activities must be a source of confusion and wonder. Often it appears that different agencies perform the same function, or worse, that government agencies work at cross purposes to each other, with one agency obstructing the other in the performance of its mission.

It sometimes happens that when Congress enacts a law, the substance of the legislation is such that it warrants the creation of a new agency to administer the law, and perhaps even to enforce its provisions. More frequently the agency assigned the task of implementing a new law is selected upon the basis of its historical jurisdiction and capability. The result is that a single purpose, or law, may be divided among several existing agencies. For example, when Congress enacted the Marine Mammal Protection Act, it expressed in a single piece of legislation its concern for an entire class of animals. At the time, management of these animals was the responsiblity of at least two separate agencies. The U.S. Fish and Wildlife Service of the Department of Interior had for years been managing polar bears, while whales and seals fell ito a category of species traditionally managed by the National Marine Fisheries Service of the Department of Commerce. It seemed only logical that these agencies should continue to exercise jurisdiction in these areas, but the consequence is that a single law is implemented and enforced by two

or more different agencies within the federal government.

Jurisdiction is defined topically, geographically and vertically, by different layers of government. Some arrangements operate on an international scale. A federal agency may share jurisdiction with a state agency performing the same function on a more local level. The state, as with coastal zone management regimes, may share its responsibilities with regional governments, special authorities or municipalities. The polar bear is of course unaware of the moment it enters the territorial sea, but legislation is such that it may make a difference in determining which agency is in charge of its welfare at any given moment.

In this section of our text we examine briefly the government agencies involved in implementing and enforcing the laws affecting fisherman. We intend to define each agency in terms of its primary responsibilities, and to relate these responsibilities to the activities of the commercial fisherman.

Federal Agencies

National Oceanic and Atmospheric Administration (NOAA), Department of Commerce

When NOAA was established as a unified agency in 1970, it incorporated a number of existing agencies of the federal government which for many years had been performing functions assigned to the new agency. As the agency's name implies, its mission is to explore, map and chart the ocean and the atmosphere. NOAA

reports the weather and studies natural events such as hurricanes tornadoes and floods in support of the safety of persons and property, environmental protection and to promote the economic welfare of the country. It operates the National Environmental Satellite Service in support of its missions.

The agency's activities are organized into four major areas - Fisheries, Oceanic and Atmospheric Services, Coastal Zone Management and Research. Although all of these activities are of interest to fishermen, the fisheries concern, organized in the National Marine Fisheries Service, has the most obvious, direct impact on the fisherman.

The National Marine Fisheries Service is the primary federal agency involved in the management of U.S. fisheries. Its enforcement division is responsible for enforcing the provisions of the FCMA, the Marine Mammal Protection Act, the Fish and Wildlife Coordination Act, and the Endangered Species Act. Under a cooperative agreement between the State of Alaska and the federal government, National Marine Fisheries Service enforcement officers are authorized to enforce both federal and state laws which relate to the activities of domestic and foreign fishermen in the Fisheries Conservation Zone. Occasionally, they exercise this authority, but the agency's law enforcement effort is targeted primarily on foreign fishing in the FCA.

The law enforcement effort of the National Marine Fisheries Service is undertaken in cooperation with the U.S. Coast Guard.

The Service does not, for instance, operate many patrol boats. Its agents routinely accompany Coast Guard vessels on their patrols and serve as members of boarding parties. NOAA's agents are able to provide the technical expertise necessary to assure that vessels inspected are complying to the provisions of the FCMA. The legal offices of the agency assist the U.S. attorney in preparing cases which result from violations of the law.

The National Marine Fisheries Service also performs important functions in the area of research. Its scientific observers accompany foreign fishing vessels operating in the zone, and the data gathered by the agency's scientists form the basis upon which the Management Councils established pursuant to FCMA make their decisions regarding optimum yield and allowable catch. NOAA provides the Secretary of Commerce with the information needed to issue permits for foreign fishing in the zone, and the agency has the authority to revoke permits.

NOAA's Office of Oceanic and Atmospheric Services keeps track of the world's physical environment. Its function consists primarily of research, but it also provides services of immediate value to the public such as weather forecasts and navigation charts. NOAA's National Ocean Survey maintains the nation's geodetic survey network and performs related hydrographic, oceanographic and survey activities in the environment.

The third division of NOAA, the Office of Coastal Zone Management, administers the Coastal Zone Management Act of 1972.

This office also administers grant programs to assist coastal states in developing and carrying out programs for managing their coastal zones, protecting wetlands and other coastal resources. It also provides Coastal Energy Impact Program grants and loans to state and local governments to offset the effects of such energy-connected activities as offshore petroleum development.

Any coastal-zone-related activity which affects the environment requires a permit which must be approved by NOAA's officials. Sometimes NOAA is the actual agency responsible for issuing the permit, but frequently it simply comments on permit applications submitted to other state or federal agencies, such as the U.S. Army Corps of Engineers or the U.S. Fish and Wildlife Service.

The Office of Coastal Zone Management also administers programs to protect coastal areas. It operates a Marine Sanctuaries Program designed to protect areas of the U.S. coast for their conservation and ecological values.

The Research and Development Office of NOAA provides support to all of the agency's programs. The programs of the office are directed at improving our understanding of the oceanic and atmospheric environments and providing solutions to environmental problems. NOAA's Office of Ocean Engineering conducts marine engineering development studies, and its Office of Marine Pollution Assessment studies the problems of ocean pollution. This office provides technical assistance to the Coast Guard in

its enforcement of laws relating to pollution of the marine environment.

At the international level, NOAA's officials are involved in the negotiation and implementation of numerous international maritime agreements including those aimed at protecting such species as whales and fur seals, or managing fishery resources. Officials of the agency participate as members of the U.S. negotiating team at the Law of the Sea conferences. The agency also conducts research under the auspices of a number of international organizations and commissions.

U.S. Coast Guard (Department of Transportation)

The Coast Guard, a military service, is part of the Department of Transportation except in times of war or emergency when it functions as part of the Navy. As a peacetime agency the Coast Guard performs a variety of maritime roles.

One of its most conspicuous missions is to conduct search and rescue operations on the high seas and navigable waters of the United States. In connection with this responsibility the Coast Guard maintains a system of vessels, planes and communication facilities. The service is also responsible for administering and enforcing established safety standards for the design, construction and operation of U.S. commercial vessels and of certain structures erected on the outer continental shelf. It also has the authority, under international agreements, to enforce certain safety standards on foreign vessels in U.S. waters.

In connection with vessel safety the Coast Guard establishes and maintains a system of navigational aids in waters subject to U.S. jurisdiction or adjacent to these waters. These aids include lighthouses, buoys, radiobeacons and others.

The Coast Guard also plays a role in protecting the marine environment by monitoring vessel discharge of certain pollutants. In exercising this responsibility it especially monitors the activities of tanker vessels.

Further activities of the Coast Guard include the operation of the government's icebreaking vessels, research in oceanography and public education through a boating safety program.

In addition to these roles the service also acts as the chief maritime law enforcement arm of the federal government. It assists in enforcement of applicable treaties or other international agreements, including fishing treaties, and also investigates possible violations of such agreements. In its law enforcement role the Coast Guard works closely with other federal agencies.

In the exercise of this broad range of responsibilities the Coast Guard has extensive powers to board, search and inspect vessels of all kinds. Its legislative mandate specifies that:

> [T]he Coast Guard may make inquiries, examination, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection and suppression of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the juris-

> diction, or the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

(14 U.S.C. § 89)

These boarding, search and seizure powers of the Coast Guard[1] can be used in the enforcement of fishing regulations with respect to both domestic and foreign vessels. In practice, however, in the North Pacific the Coast Guard focuses its enforcement effort on foreign fishing vessels between three and two hundred miles. Technically, it has the authority to enforce certain treaties even beyond two hundred miles, but, in reality, such an enforcement effort is rarely made. The Coast Guard limits its enforcement efforts to foreign fishing vessels within two hundred miles because of budget and equipment constraints. Under the terms of the FCMA and the accompanying network of treaties the Coast Guard monitors open and closed areas, inspects vessels for catch and gear limitations, levies fines and occasionally seizes vessels found in violation of the regulations.

Although its stated powers of search and seizure are fairly broad, in actual practice the Coast Guard follows a policy of self-restraint in the exercise of these powers. A boarding party can, and sometimes does, conduct vessel searches without warrants, but, if possible, the service prefers to obtain a warrant beforehand. Moreover, it rarely seizes a foreign vessel without receiving prior clearance from its own department, the Departments of Commerce, Justice and State and from the White

House. Ordinarily a vessel is seized only after it has been under surveillance for some time and when the Coast Guard is fairly assured that its case against the ship is a strong one.

During an inspection almost the entire vessel is subject to the Coast Guard's search authority, including the relevant records. These records include FCMA logs, the trawl log, the production log, the radio log, the ship's log and the fish recorder.

When inspecting a vessel the Coast Guard boarding party is often assisted by a National Marine Fisheries Service agent. This agent, an expert in fisheries law enforcement, can aid the sometimes less-experienced Coast Guard officials in judging the size and type of the catch.

If a vessel is seized it is escorted to port by the Coast Guard, and the master of the ship in port. The hearing process is conducted through the U.S. attorney's office.

In enforcing fishing regulations the Coast Guard works closely with various federal and state agencies, including most notably the National Marine Fisheries Service and the Alaska Department of Public Safety. Moreover, an officer of the Coast Guard sits on the North Pacific Fisheries Management Council as a non-voting member. His primary role on the council is to report on the enforcement effort and to comment upon the enforceability of proposed management plans.

U.S. Fish and Wildlife Service (Department of the Interior)

The United States Fish and Wildlife Service has existed in its present form since 1974, but it was preceded by a series of similar departments or bureaus whose primary goals were similar: to ensure that the American people have the maximum opportunity to benefit from the fish and wildlife resources of the country. In pursuit of this goal the bureau oversees the conservation, development and management of these fish and wildlife resources. It is responsible for wild birds, certain mammals, inland sports fisheries and various fishery research activities. The bureau performs biological monitoring through studies of fish and wildlife populations and it supervises management of certain threatened species. In addition, it is involved in the assessing of the environmental impact of such projects as the building of dams and nuclear power facilities and the channeling of streams.

Specific wildlife and fishery resources responsibilities include:

1. Responsibility for migratory birds. The bureau assumes wildlife refuge management and game law enforcement. It also conducts research on the life patterns of protected species.

2. Responsibility for certain mammals (primarily big game but also some marine mammals). The bureau manages the refuges, provides law enforcement, and conducts research on disease and population distribution.

3. Animal damage control. The bureau takes measures to limit animal and bird destruction of crops and livestock and performs research in this area.

4. Fish and wildlife research. The bureau, through units at 45 universities throughout the country, conducts research and supervises graduate student work to supplement the work of its own research units.

5. Coastal anadromous fish. The bureau is involved in hatchery production and stocking, and it conducts research on nutrition, disease and habitat requirements.

6, Other inland fisheries. The Fish and Wildlife Service works in hatchery production and stocking in state-managed waters and on Indian lands. It also provides technical assistance.

In addition to the above responsibilities the bureau also provides assistance and consultant services to foreign countries, and it engages in a broad public education effort.

To accomplish this wide range of goals the service maintains a headquarters office in Washington, D.C., six regional offices, including one in Alaska, and various research units, including the 391 National Wildlife Refuges, 13 major fish and wildlife laboratories, 91 National Fish Hatcheries and 45 university research units. It also has a nationwide network of enforcement agents.

All of these responsibilities require some level of FWLS activity in Alaska. Among those commanding the greatest resource commitment are the management of the Alaska units in the national refuge system. The service has primary responsibility for law enforcement on these refuges. They are areas of federal jurisdiction, but, essentially, under the terms of the Fish and Wildlife Coordination Act, state game and conservation laws provide the framework in which the Fish and Wildlife agents work. These state laws are applicable on the refuges as long as they do not conflict with any existing federal laws.

The bureau cooperates closely with the National Marine Fisheries Service since both are involved with wildlife regulation and under the Marine Mammal Protection Act and the Endangered Species Act the two departments split jurisdiction.

In Alaska the Fish and Wildlife Service's direct involvement with fisheries law enforcement is primarily limited to enforcement of any applicable fishing laws on the national refuges and to jurisdiction under the Black Bass Act.

Environmental Protection Agency

The Environmental Protection Agency was established to facilitate effective government action on behalf of the environment; it endeavors to control pollution of all types. The agency has developed programs and regulations to stem air and water pollution and to control the dissemination of toxic substances. In addition, it coordinates a national research program designed to

uncover more information about all aspects of the environment.

The water quality activities of EPA form its strongest tie to fishing interests. Under a multi-faceted program the agency is attempting to restore the quality of the nation's waters and to enhance the marine environment. It has developed and promulgated water quality standards and effluent guidelines; it provides technical assistance and training in the area of water quality analysis and assistance in the development, management and operation of waste management activities. Insofar as these activities work to better the marine environment they also work to the advantage of the fisherman.

A number of these activities are conducted under the provisions of the Clean Water Act. This Act established the National Pollutant Discharge Elimination System (NPDES) which monitors the waste disposal of various industries and commercial concerns. In Alaska this program is particularly concerned with waste discharge at the fish processing plants.

Processors must conform with established EPA regulations in the treatment of waste discharge. For remote plants these regulations require grinding of all waste to one-half inch pieces before discharge into the water, while non-remote plants must screen and collect all solid waste and test for suspension of oil and grease particles in the discharge water. A plant is classified as remote or non-remote on the basis of its distance from centers of population. In Alaska most plants currently hold

remote classification.

All processors, no matter what their scale of operation, must conform with these regulations. To monitor compliance the EPA conducts inspections and issues permits. Since all processors are bound by the regulations, all should, in theory, apply for permits to operate. However, because of budget constraints the agency cannot administer so large a program. Instead, for administrative purposes only, it classifies the processing operations as major or minor and focuses its monitoring efforts on the major plants. This arrangement, however, does not relieve the minor plants of their obligation to meet established standards.

When it issues permits, the EPA gives the other resource agencies, such as the National Marine Fisheries Service, the Fish and Wildlife Service and the Alaska Department of Environmental Conservation, a chance to comment. Since the Alaska Department of Environmental Conservation must certify all permits issued by the EPA the agency automatically provides for incorporation of state water quality standards in the drafting of the permit. These state standards can be more stringent than the federal regulations.

EPA enforcement agents have the authority to enter a facility at any reasonable time in order to inspect its discharge operation and any relevant records. Most violations are civil offenses subject to a fine, but very serious ones may be classified as criminal. In its enforcement efforts also, the agency works

closely with the Alaska Department of Environmental Conservation which operates a similar, but more wide-ranging, discharge program.

Food and Drug Administration (Department of Health and Human Services)

The Food and Drug Administration enforces the provisions and related regulations of the Food, Drug and Cosmetic Act. Its activities are directed toward protecting the health of the nation against impure and unsafe foods, drugs, cosmetics and other potential hazards.

The Administration's Bureau of Biologics administers the regulation of biological products shipped in interstate and foreign commerce. If products are involved in interstate commerce, the FDA has jurisdiction over them from the time they are processed until the product reaches the consumer. The administration inspects manufacturers' facilities for compliance with sanitation standards; it tests products submitted for release; and it establishes written and physical standards to which manufacturers must comply. The FDA also approves licenses for manufacturers of biological products, conducts research related to the development, manufacture, testing and use of both new and old food products.

Offices within the FDA are organized upon the basis of the different types of products which the agency regulates, resulting in a Bureau of Foods, a Bureau of Drugs, a Bureau of Radiological Health, a Bureau of Veterinary Medicine, a Bureau of Medical

Devices, etc. The agency also operates a National Center for Toxicological Research which conducts research programs to study the biological effects of potentially toxic chemical substances found in the environment.

Since most fish products are shipped in interstate commerce, the FDA has a responsibility for regulating the sanitation and shipping practices of the processing industry. This regulation involves periodic inspections by FDA officials of the processing plants in the fishery to assure that the plants comply with the standards in force. The inspection covers such things as the plant's equipment and storage facilities, as well as the practices of its employees. Following the inspection the FDA inspector files a report to both the processor and the compliance section of the agency. If the inspection reveals violations of sanitation standards, the Administration conducts a second inspection to assure that the unsanitary practices have been corrected. Repeated violations can result in prosecution of the plant's owners by the U.S. Attorney. Both civil and criminal charges may be filed, with penalties of fines and imprisonment. The court may also empower the FDA to seize the product (a measure designed to assure that it does not reach the consumer) and close the processing plant.

Since the FDA's inspections are periodic, its officials are not continuously present in the fishery. Normally a team of inspectors will visit the fishery for only the length of time necessary to conduct the inspections. They, of course, return if

a product is later found to be unsafe at some point of its distribution chain. An unsafe can of fish in the grocery store, for instance, will result in an investigation of the entire distribution chain, extending to the processing plant. The investigation may even extend to the fisherman if the product's defect is determined to have originated before the processor received it. The FDA's interest also extends to habitat conditions, and it will monitor such things as the effects which oil spills will have on the quality of the fishery products in the area of the spill.

The principal issue involving the work of this agency in the fishery is whether it is enough. In the decades of the 70's and 80's, both the tuna industry and the salmon industry have been rocked by botulism infestation - a deadly organic poison that can start in the canning process. The cost to the industry in each case in lost sales and public consumption trends runs in the hundreds of millions of dollars, in addition to the loss of life or serious illness that resulted. While expansion in the role of the FDA may not be the answer, on an industry basis there is considerable pressure to develop more effective quality control systems.

Occupational Safety and Health Administration (Department of Labor)

The Occupational Safety and Health Administration (OSHA), a division of the Department of Labor, develops safety and health standards for various occupations, institutes regulations, con-

ducts inspections to monitor compliance with the regulations and issues citations in the case of violations. The far-reaching range of OSHA responsibility and the detailed nature of its regulation makes OSHA perhaps the most controversial of all federal regulatory agencies in the 1970's and 80's.

The stated purpose of the agency is to ensure the physical safety of the employee in the work place. In pursuing this goal OSHA covers a broad range; it regulates such matters as the air quality of a particular work environment, the presence of sufficient safety equipment and the availability of hygienic eating facilities.

The regulations of OSHA are industry and occupation-specific. That is, different standards apply for different types of employment. In regulating the fishing industry OSHA uses both its general and its longshoremen standards. The rule applied depends upon the activity involved and the location in which it takes place. Generally, the longshoremen standards are applicable during the loading and off-loading of a vessel, while, for example, the general standards are used in evaluating the processing lines on a ship or on shore. In addition to monitoring ships of all types OSHA also regulates the work environments of all marine terminals and ship-repairing facilities; hence, its involvement with the fishing industry as a regulatory force is broad.

To ensure compliance with the established regulations OSHA

agents inspect the various work places. Although they are not announced beforehand, these inspections are conducted according to a general schedule. The agency prohibits random inspections in an effort to achieve a fair standard of operation and to prevent any possibility of harassment of particular employers. Inspectors can depart from the general schedule in cases of imminent danger in the work place or upon specific complaints. Vessels are inspected while they are in port. The agency relies on the Alaska Department of Public Safety to supply current information on the presence of ships in ports around the state.

Agents conducting inspections must ask permission to enter the work place (or to board a ship). If permission is refused a warrant to inspect can be obtained; if admission is still refused the employer can be held for contempt of court.

If, during the course of an inspection, an OSHA agent notices a violation of a regulation he issues a citation. Serious violations involve a mandatory penalty; the penalties for lesser offenses depend upon the gravity of the violation.

Citations are issued against the employer. Since OSHA is interested in the safety of the employee it focuses upon the employer-employee relationship, and the employer is considered the one responsible for providing a safe work place. The citation, which requires the review and approval of the agent's superiors, describes the violation, the penalty involved and the period allowed for correction of the violation (abatement date).

Ordinarily the OSHA agent and the employer cited confer concerning the amount of time required to correct a violation. If an employer is dissatisfied with the citation he may contest it; his appeal may contest the existence of the violation itself, the penalty imposed or the abatement date. After administrative appeals are exhausted, such appeals are handled through the federal court system. If a citation is contested the penalty and abatement date are suspended until a decision is rendered.

If the employees of the employer who is cited are unionized OSHA must keep the union informed concerning the citation process. The union may also appeal the abatement date.

To assist OSHA in monitoring the safety of various work places employers are required to maintain records concerning work-related illnesses, injuries and fatalities. OSHA agents may inspect these records or the employer may be asked to submit them for a statistical survey.

In Alaska OSHA cooperates closely with the Alaska State Division of Occupational Safety and Health. Essentially the two agencies divide their common jurisdiction for enforcement purposes, the federal department exercising maritime jurisdiction while state officials assume responsibility on land. The occupational safety program of the state, which is 50% federally-financed, must be at least as stringent as the federal one. In other words, the state must at least enforce federal standards, but it is also free to establish and enforce its own more

exacting regulations.

OSHA also cooperates closely with the Coast Guard. The Coasts Guard monitors vessel safety while OSHA is concerned with the safety of the people employed on the ship; hence, the interests of the two often overlap. The agents of both departments try to keep each other informed of possible violations under the other's jurisdiction.

U.S. Army Corps of Engineers (Department of Defense): The Public Works Program

The U.S. Army Corps of Engineers is perhaps best known for its sponsorship of major construction projects like the Panama Canal and major hydroelectric projects. It also sponsors many less massive military and civilian projects.

Civilian projects sponsored by the Corps fall under its civil works program, which constitutes the nation's major water resources development activity. Projects in this category include dams, harbors, waterways, any alternation of the shores of the nation's natural water system. The scope of these projects include a variety of activities: flood control, providing electric power, improving recreational opportunities or water quality, enhancement of fish and wildlife, and general protection of the shores of the oceans, lakes and rivers of the nation.

In sponsoring these projects, the Corps implements or safeguards the provisions of a variety of federal laws, including the Environmental Protection Act, the Clean Water Act, and the

Coastal Zone Management Act.

One of the Corps' responsibilities of immediate concern to the fisherman is its responsibility in maintaining the nation's marine waterway system (as distinguished from the maintenance of navigational aids which lies within the Coast Guard's domain). The Corps assessment of this system is continuous; it periodically conducts studies of critical navigation areas, and it determines whether incidents such as a vessel running aground require action to alter the structure of the system such as the removal of obstructions.

Many of the Corps' major projects, such as the construction of harbors and dams, also affect the fishery since they may have potential consequences on fisheries habitat and spawning. Over the past decade or more the review process which is included in the planning phase of any Corps project has grown considerably, reflecting increased recognition of the many groups and individuals affected by Corps action. As a matter of policy, any planned project is reviewed by all of the state and federal agencies which may have an interest in its consequences. Any dam project, for instance, would be reviewed by the U.S. Fish and Wildlife Service and the State Department of Fish and Game as well as other government agencies, in the early planning stages. Public hearing processes are also involved.

The power of other federal agencies over Corps proposals varies depending upon the project and the legislation affecting

it. The reviewing agencies may or may not have the authority to veto a project, but at the very least, their objections will effect alterations in the planning of the project.

It is noteworthy too that most of the projects sponsored by the Corps of Engineers are initiated at the local level, where the fisherman has more input in the decision making process. It is the city or village which initially decides that it needs a new harbor or an enlargement of its present one. The local entity then solicits the Corps to conduct a feasibility study.

The Corps Permitting Program

The Corps of Engineers also operates a regulatory program for issuing permits to private individuals and interests, and other government entities. Any organization wishing to alter the shores of the nation's water system (rivers, lakes, oceans) must first obtain a permit from the Corps of Engineers. Applications for permits, even for minor alterations such as the construction of a small boat launching ramp, go through the same review process that the Corps' major projects undergo. If, for example, the National Marine Fisheries Services objects to the planned project on the grounds that it will have harmful effects on nearby clam beds, the Corps will not issue a permit. The alternative left to the person wishing to construct the ramp is to alter his plans to conform to the standards required by the National Marine Fisheries Service. To the individual, the Corps permit system may seem an overly lengthy process; it is designed to serve as a safeguard for the public.

Once the Corps issues a permit, its officials conduct inspections to ensure that the actual fixture conforms to the approved plans. These inspectors have no police powers per se to enforce compliance (i.e., they cannot make arrests or issue citations), but the Corps does have recourse to legal action through the offices of the U.S. Attorney.

The Outer Continental Shelf Office and the Geological Survey

The Outer Continental Shelf Office and the Geological Survey function as sister agencies within the Department of the Interior in facilitating the exploration and development of the resources of the shelf. They are not directly involved with fisheries law enforcement, but because their activities cover areas within the fishing conservation zone they must take certain fishing concerns into account when planning the exploitation of mineral resources of the shelf.

Both departments conduct their work with particular regard for environmental concerns such as the preservation of fish habitats. To prevent as far as possible any adverse effects of mineral development on the marine environment, OCS and the Geological Survey work closely with NMFS, the Fish and Wildlife Service and other federal and state agencies.

Under a directive from the Council on Environmental Quality, the OCS office conducts local hearings upon specific leasing proposals. From these hearings the office gathers information from those members of the community to be affected by the proposed

development -- notably members of the local fishing industry. The OCS office then utilizes this information in preparing its environmental impact statements and in lease-planning.

After leases have been awarded, the Geological Survey oversees the regulation of the actual mineral exploitation. It issues permits for drilling, collects royalties on production and fulfills various mineral resource evaluation functions.

The two offices function under an assortment of legislation designed to protect the marine environment while permitting the development of energy resources. Most notable among the laws shaping their activities are the Outer Continental Shelf Lands Act, the National Environmental Policy Act of 1969, the Federal Water Pollution Control Act, and Fish and Wildlife Coordination Act, the Marine Mammal Protection Act and the Endangered Species Act.

U.S. Customs Service (Department of Treasury)

Laws establishing customs districts and authorizing officers to collect duties on goods brought into the country were among the first legislation enacted by the U.S. Congress when that body first met in 1789. The present U.S. Customs Service was established as a separate agency under the Treasury Department in 1927.

The primary responsibility of the Customs Service is to collect the revenue from imports, but the agency is also involved in the enforcement of over 400 statutory or regulatory requirements relating to international trade. Its specific responsibilities include: (1) assessing and collecting customs duties, excise taxes, fees and penalties due on imported merchandise; (2) interdicting and seizing contraband, narcotics and illegal drugs; (3) processing persons, carriers, cargo and mail into and out of the United States; (4) administering certain navigation laws; and (5) enforcing provisions of such legislation as the Clean Air Act and the prohibition of the discharge of refuse and oil into the sea provided for in the Oil Pollution Act. The agency also has extensive involvement with outside commercial organizations and trade associations, and with international organizations and foreign customs services. It has foreign field offices in Montreal, Mexico City, London, Paris, Bonn, Rome, Hong Kong and Tokyo.

Customs officials are present in the fishery because any vessel coming to the U.S. must make formal entry. Entry requires

extensive documentation regarding the nature and value of merchandise entering the country, payment of duties and tonnage taxes. It always involves an inspection of the vessel by a U.S. Customs officer. The requirement of making entry also applies to U.S. vessels which rendezvous with foreign vessels in international waters, and would include U.S. fishing vessels selling their catch to foreign processors beyond the territorial sea.

The Customs Service also has regulatory authority over foreign vessels which enter U.S. waters to pick up fish or other cargo for transport to a foreign nation. Once the vessel is loaded it must obtain clearance from the Customs Service and file a report termed a shipper's export declaration. Before the vessel departs from the U.S. it will be boarded by an officer of the Customs Service who will conduct an inspection of the goods being exported.

Provisions of the Jones Act which relate to the transport of goods or persons between two points in the U.S. in "foreign bottoms," meaning vessels built outside of the U.S., are enforced by the U.S. Customs Service. The agency also enforces the provisions of the Nicholson Act which prohibit foreign fishermen from selling their product in the U.S.

U.S. Customs inspectors are law enforcement officers. They have the authority to seize merchandise, issue citations and make arrests. The laws they enforce grant the inspectors broad powers to search vessels, persons and merchandise without a warrant if

the officers have reasonable cause to suspect a violation. Violations are prosecuted in federal courts by the U.S. Attorney.

U.S. Immigration and Naturalization Service (Department of Justice)

The U.S. Immigration and Naturalization Service is concerned primarily with aliens: foreign nationals seeking to enter the U.S. either permanently or temporarily for such purposes as study, employment, or tourism. The goal of the Service's activities is to restrict the entry of individuals which the U.S. government may for one reason or another judge undesirable and to ensure that an alien entering for reasons of employment will not have an adverse effect on the employment of U.S. citizens by performing tasks which normally would have gone to an American worker.

Specifically, the Immigration and Naturalization Service is responsible for administering the laws relating to the admission, exclusion, deportation and naturalization of aliens. It interrogates and may inspect aliens to determine their admissibility, its border patrols guard against illegal entry, and its agents apprehend and remove aliens in this country in violation of the law. The Service also examines alien applicants wishing to become U.S. citizens.

As part of its mission of administering the country's immigration laws, the Service routinely inspects all foreign vessels entering the U.S. Its inspection is directed toward the people on board, again for the purpose of assuring that aliens do not

enter the U.S. illegally. Crew members of the vessel, although they do need documentation to enter the U.S., do not need special permits to work on board while the vessel is in U.S. waters. The immigration and naturalization inspector does have summary authority to confine any alien crew member to the vessel while it is in a U.S. port if for any reason he determines that it would be undesirable for the crew member to go ashore.

Since vessels entering the U.S. are inspected by the U.S. Customs Service and by the U.S. Immigration and Naturalization Service, the two agencies operate under a cross-utilization agreement. Immigration and naturalization inspections are routinely conducted by officers of the Customs Service, and vice versa.

Particular interests of the Immigration and Naturalization Service in the fishing industry arise from the presence of foreign fishermen in the FCZ and of foreign nationals in the processing industry. Foreign fishing vessels come in contact with the Immigration and Naturalization Service only if they enter the U.S., which they do not do. Many fishing vessels make U.S. part stops for fuel purchase or related provisioning and these visits are not handled much differently than the visits of ships reaching the United Sttes in normal international commerce. But the question of foreign nationals involved in the processing industry is of special concern.

The basic thrust of U.S. law regarding alien employment is

that this employment is not permitted if it will have an adverse effect on the U.S. labor force. Permission to employ an alien must be initiated by the employer through the Immigration and Naturalization Service, and the latter agency may issue the permit only if it obtains certification from the Department of Labor that the employment of the alien will not deprive a U.S. citizen of employment. Permits, if granted, are issued to the individual alien, and are normally temporary. In the fishing industry they have often been issued to technicians working in the processing plants, employed either by the processor or by the buyer of the product. The technicians are there to supervise the preparation of the product for a foreign market. Alien employment also occurs in new industries, such as bottom fish processing, in which the U.S. labor force lacks the expertise necessary to operate the plant. Aliens will thus be legally employed, though on a temporary basis, for the purpose of supervising the operation and training the U.S. workers.

There has been some controversy over the question of aliens employed on foreign owned and operated factory ships permitted to purchase fish from U.S. fishermen in the FCZ, and perhaps even in the territorial sea. The question is, if the vessel enters U.S. waters, are the individuals on board who are involved in the processing operation required to obtain permits to work in the U.S.? (There is no question concerning the crew members operating the vessel itself.) Although there has been no litigation on the subject, as of this writing the opinion of the U.S. Department

of Justice is that inasmuch as the vessel is designed specifically for the purpose of processing fish, all of the individuals on board employed in this operation are technically "crew members," and thus do not need a permit to work in the U.S.

As federal law enforcement officers, inspectors and investigators of the Immigration and Naturalization Service work closely with other federal and state law enforcement agencies. Besides the Customs Service, they frequently interact with the FBI on matters concerning the presence of aliens in the U.S., and with the Coast Guard in their shared responsibility of monitoring the flow of people at the coastal borders of the U.S.

Federal Bureau of Investigation (Department of Justice)

As the principal investigative arm of the United States government, the FBI assumes a broad-ranging responsibility. It gathers facts, locates witnesses and compiles evidence in matters in which the federal government has an interest. It is active in the criminal, civil and security fields.

The bureau's participation in fisheries law is, however, rather limited. In the case of certain offenses committed within the admiralty or maritime jurisdiction of the federal government it can serve an investigative role. These would be criminal offenses such as murder, not violations of fisheries regulation. In addition, the FBI investigates any crime committed against an agent of the feeral government, so, for example, the bureau would be involved in prosecuting charges made in the event of an

assault on a Fish and Wildlife game warden. It also provides assistance or advice if called upon by other government agencies.

U.S. Navy (Department of Defense)

The primary role of the Navy in fisheries law enforcement in the North Pacific is to provide logistical support to the main law enforcement agencies, such as the Coast Guard and the National Marine Fisheries Service. At Adak, Alaska, for example, naval personnel cooperate with other agencies through permitting the use of their facilities and assisting in various activities. Navy boats regularly transport NMFS observers from foreign ships to port.

In addition the Navy is involved in oceanographic studies, exploring the ocean for naval purposes and other national concerns. Inevitably some of this research has ramifications for the fishing industry.

State Agencies

Alaska Board of Fisheries

The Alaska Board of Fisheries acts as a community and industry based policy control agency over the State Department of Fish and Game and the other state agencies active in the areas of fishery management and enforcement. Its seven members are appointed by the Governor and confirmed by the legislature.

The board is the ultimate decision-making body involved in the formulation of regulations governing Alaska's fisheries and,

in consultation with the Governor, appoints the Commissioner, Department of Fish and Game. Though it conducts some research on its own, for the most part the board relies upon information provided to it by the state agencies (Fish and Game, Department of Public Safety, etc.) and by the public.

At a more general level, the state legislature has enacted legislation regulating Alaska's fisheries, but these laws provide only guidelines or principles. Specific regulations applied to a geographic base are promulgated by the Board of Fisheries. The board holds two major meetings each year for the purpose of making its decisions on these regulations: a fall meeting dedicated to the question of fin fish, and a spring meeting dealing with shell fish. Interim meetings and hearings are held at more frequent intervals.

In making its decisions, the board is assisted by numerous local advisory councils consisting of fishermen themselves and other individuals with an active interest in the fishery. These councils bear a close relationship to the design of the board as an instrument of the public. The Department of Fish and Game, the Department of Public Safety, and other government agencies make recommendations to the board on the basis of their professional expertise in the areas of resource management, conservation, and law enforcement. The advisory councils make recommendations on the basis of their status as citizens with an active interest in the resource. They represent the grass roots level of public input into the regulatory process.

The government agencies involved in the conservation and management of the resource are most responsible for the determination of biological and law enforcement factors relevant to the fisheries, such as the annual yield, total allowable catch, and enforceability of proposed regulations. The board addresses also questions of a more social and economic nature: the allocation of the catch among the various user groups, the effect of opening and closing dates on market conditions, etc. In addressing these questions, the board considers such things as historical use, economic dependency, past market patterns, and many factors that are, in effect, political.

In theory, board members reach their decisions after considering the input of all of these groups, and their decisions thus reflect the best interest of the state and its people. Naturally, the disposition of the individual to agree with this best interest conclusion depends upon the degree to which his own interests are protected or advanced in the decision. The Board does operate within the confines of the legal advice provided by an Assistant Attorney General provided to the Board, to assure that the regulations meet constitutional standards of equal protection, substantive due process or fairness and the like. Regulations formulated by the Board of Fisheries have the force of laws in the State of Alaska.

Alaska Department of Fish and Game

In 1949 the Legislature of the Territory of Alaska established a Department of Fisheries. As an agency of the Territory,

this department had no regulatory authority, but it did exercise an advisory function to the federal government. More important, it established a research arm and developed an administrative structure that was incorporated into the State Department of Fish and Game when Alaska entered the union. So the State of Alaska got off to a running start in fisheries management.

We have seen that within the federal system in the United States, individual states share with the federal government considerable authority in their regulation of the nation's fisheries. In Alaska, the agency with the primary responsibility for exercising this authority on a day to day basis is the State Department of Fish and Game. In the years immediately following statehood, this agency was responsible for both the formulation of state laws and regulations regarding fish and game regulations requiring substantial expertise in the biology of the fishery, and their enforcement. In the first decade after statehood, biological and law enforcement activities maintained an uneasy relationship under one roof. Since 1972, responsibility for enforcement of the state's laws and regulations has resided primarily in the Department of Public Safety, which also supervises the State Troopers, in a Division of Fish and Wildlife Protection.

The Department of Fish and Game serves a broad spectrum of interests in the state's fish and wildlife. Its offices consider the impact of sports fishing, subsistence fishing, and hunting, as well as that of commercial fishing, in their direction of the

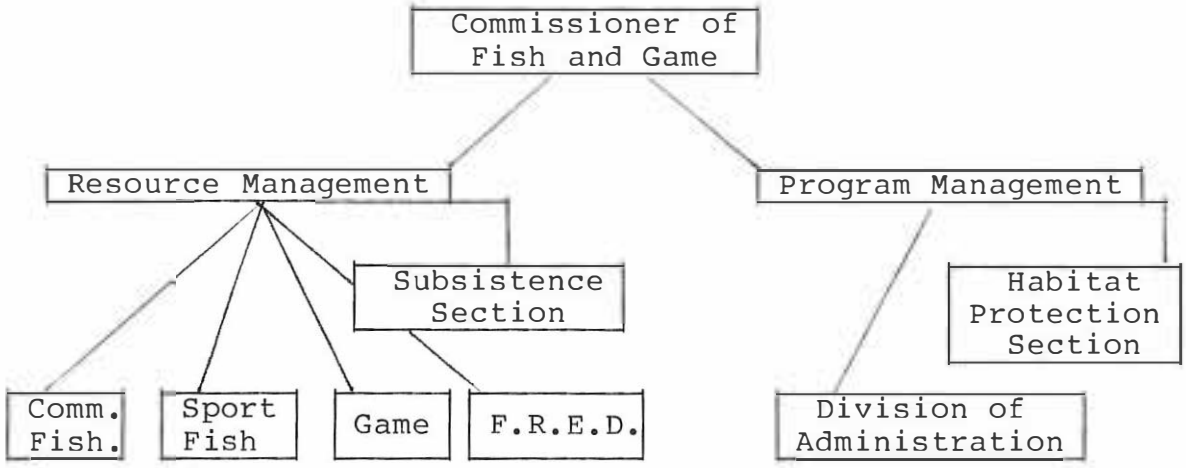
state's resources. All of these offices work under the direction of the department's senior official, the state Commissioner of Fish and Game.

Within the department, the division of commercial fishing is the agency most directly related to the activities of the fisherman. Its responsibilities include conducting research on the subjects of biological and environmental factors in the fisheries, research designed to determine such things as the allowable gear and the duration of the seasons best suited to the protection of the sustained yield of the fisheries.

The division of commercial fisheries also monitors levels of escapement, and works together with other divisions within the department to promote fisheries enhancement through hatchery programs and habitat improvement programs. In 1971, the legislature established a special division to foster Fisheries Rehabilitation, Enhancement and Development (F.R.E.D.). This division sponsors research and programs designed to supplement traditional approaches to fisheries management. Traditional regulatory schemes emphasize escapement and limiting catch through control of gear and fishing time, etc., whereas the enhancement programs, directed primarily to the salmon fisheries, seek to improve management in a positive manner by increasing the total catch available. The F.R.E.D. division sponsors stock rehabilitation programs, using hatcheries to increase the number of fish in a depressed stock. Its fishery enhancement programs use hatcheries to produce fish for direct harvest and the divi-

sion also coordinates the activities of private non-profit hatchery programs (PNP's) working to improve the strength of the fishery.

The Sport Fish Division and the Game Division parallel the Commercial Fisheries Division and the F.R.E.D. division in administering the department's resource management program. A special section is charged with monitoring subsistence hunting and fishing activities in the state. The Department of Fish and Game also has internal offices responsible for the administration and management of its programs, and a habitat protection section.



The Department of Fish and Game operates at the most elementary level in the formulation of regulations affecting the state's fisheries. Since fisheries management involves the regulation of fisheries catches and escapement upon estimates which may vary considerably under the impact of new information and under circumstances of weather, run intensity and fishing pressure which can change radically from day to day or even hour

to hour, the power given to the Department to issue and amend emergency regulations, effective on very short notice, is essential to the effective management of the fishery. The Commissioner and his representatives have emergency regulatory authority to open and close seasons and areas in a relatively brief period of time giving notice by radio, for example. Decisions to exercise this authority frequently must be made in the fishery itself by the officials monitoring the catch on a daily basis.

Though the Commissioner has this authority and commonly exercises it, the department's role in the policymaking process is advisory. It makes recommendations based upon its findings to the State Board of Fisheries, and the board in turn makes the final decision. Once approved by the Board of Fisheries, these regulations have the full force of state law.

Though not a part of the Department of Fish and Game, we mention here two state organizations whose activities relate closely to the interests of that department. A separate board appointed by the Governor, the Alaska King Crab Marketing and Quality Control Board, consists of six representatives of the crab processing industry. This board conducts education and research programs and establishes standards of quality and purity in the industry.

Since 1974 the State Department of Commerce and Economic Development has operated a program of great interest to the

fisherman, the Commercial Fisheries Loan Program. Through this program, commercial fishermen may obtain low interest loans for the purpose of purchasing gear and permits or of upgrading their capability in general. The federal government also is involved in various loan programs, particularly vessel construction loans, of interest to the fishermen but these activities lie beyond the scope of this book.

Alaska Department of Public Safety

In 1972 by executive order the Governor of Alaska transferred the responsibility for the enforcement of the state's fishery laws from the Department of Fish and Game to the Division of Fish and Wildlife Protection of the Department of Public Safety. Under the direction of the Commissioner of Public Safety, officers in the division enforce state laws and regulations for the protection of commercial and sport fisheries, game animals and wildlife environment.

In the enforcement of the state's laws relating to commercial fishing, the Division's officers conduct some of their activity on shore. They inspect fish tickets and catch size at the cannery for species for which the catch is regulated; they conduct dock checks of vessel registration documents and licensing for fishermen and gear; they also monitor set net fisheries from the shore.

Most of the law enforcement activity, however, takes place on the water by patrol boats assisted extensively by aerial sur-

veillance. In conducting their patrol missions in the fishery, officers of the Division of Fish and Game Protection board the vessels they encounter as a matter of inspection policy and need not be acting on suspicion.

Officers of the Division of Fish and Game Protection are State Troopers. They are armed, and the boarding party, which depending on the size of the vessel boarded varies from one to four or more officers, has the authority to issue citations, make arrests, and seize the vessel and gear. The catch is always seized when the officers discover violations.

The most frequent course of action taken by officers when they encounter violations is to issue a citation. Arrests and seizures normally occur only for blatant and continued violations. This is a policy dictated by practical concerns. Once a vessel is seized, the state is responsible for the vessel and the people on board; the officers seizing the vessel must have some place to secure it adequately. The preparation for a seizure thus takes careful planning before the action can be taken. On the spot seizures on the basis of searches conducted without a warrant are normally done only if there is reason to believe the offender will permanently leave the area of jurisdiction unless the vessel is seized.

Since they are responsible for enforcing state laws, Division of Fish and Game Protection officers target their effort on domestic fishermen. But by virtue of the cooperative enforce-

ment agreement between the state and the federal government, they have the authority to enforce federal laws relating to both domestic and foreign fishermen.

The Division of Alaska State Troopers, the other major law enforcement division within the Department of Public Safety, is responsible for the enforcement of state laws relating to crimes of a more general nature. Its officers investigate crimes, apprehend criminals, enforce traffic laws and the provisions of general police services in rural areas. The two divisions work closely together in their law enforcement activities. State Troopers and Division of Fish and Game Protection officers receive the same basic training at the state's academy. They hold the same ranks, benefits and pay. Normally an officer is assigned permanently to one division or the other within the department, but they may transfer if they desire to do so. They frequently assist each other in the performance of their duties.

Officials of the Division of Fish and Wildlife Protection also work closely with the Department of Fish and Game. They comment on the Division's ability to enforce proposed regulations, and make recommendations on enforcement to the Board of Fisheries.

Alaska Department of Environmental Conservation

The major contribution of the Alaska Department of Environmental Conservation to fisheries law enforcement is in the area of processing plant regulation. The primary goal of the

department is to ensure a safe product for the marketplace. In the processing facilities it monitors both production procedures and the quality of the final product. In addition, it enforces state waste disposal standards.

All processing plants are required to have a permit for operation issued by the department. Ordinarily, these permits are issued on the basis of information submitted by the processors. Permits so awarded are, in effect, temporary because they are issued subject to an in-plant inspection and can be revoked automatically if the processor violates established standards. After a plant inspection is made, a final permit, renewable each year, may be issued. This permit can only be revoked through a court process. Processors are required to maintain records on their operation in the plant.

Agents from the department may visit a processing plant for an inspection at any reasonable time. They have the authority to inspect everything connected with the operation or affecting the quality of its product and all relevant records. These inspectors usually ask permission before entering a plant, but if permission is refused they can close down the operation immediately.

The department fosters a cooperative relationship with the processors and provides assistance in meeting the standards. Usually violators of regulations receive only a fine, but in the case of a serious potential hazard an inspector can stop an operation immediately.

The department works closely with the federal Food and Drug Administration to ensure that the two agencies together provide as much coverage as possible of the processing operations. It also cooperates with the Environmental Protection Agency in the enforcement of waste disposal standards.

Local Entities

Harbormaster

For fishing vessels in port, the harbormaster is one of the main contacts with the local government. He is generally a municipal employee who works in cooperation with other municipal officials to provide adequate surveillance and management for the harbor area. In Alaska he follows the guidelines and directives of the Division of Harbor Design and Construction in the Alaska Department of Transportation and Public Facilities. Among his tasks are the assignment of berths, the monitoring of harbor traffic and the administration of various services such as boat tows, boat lifts, waste disposal and electrical hook-ups. Through him vessels receive necessary public services while he ensures their compliance with municipal regulations.

He oversees the harbor's fire-fighting and emergency equipment and procedures, and he works closely with the local fire department and emergency services to ensure prompt and adequate back-up when it is needed. He also monitors in-harbor pollution from vessels to ensure compliance with regulations and ordinances.

The harbormaster has the authority to enforce all harbor ordinances and he may issue citations for violations. If other than minor infractions of harbor regulations occur he calls upon the assistance of the local police or whoever has jurisdiction over the particular action.

Private Organizations

Like the harbormaster, private organiztions are properly considered local interests, since fishermen's organizations tend to be organized on the basis of the particular fisheries in which their members operate (although with such anomalies as organizations of fishermen who live in the Seattle area and fish in the Bering Sea). To a lesser extent, this same local orientation is characteristic of associations of fish processors.

These organizations of course play the traditional role of unions, negotiating contracts between the fishermen and the fish processors, but they also play an active role in negotiating with the governments, state and local, in an attempt to influence the formulation of policy, laws and regulations.

The input of these organizations in the formulation of policy and regulations is most effective at the level at which policy is actually determined. For example, they have a negligible impact on the Coast Guard, which only enforces policy, and little or no impact on the Department of Fish and Game, which bases its recommendations primarily on biological factors.

Private organizations do have an effect on the decisions of

the state Board of Fisheries, especially through the local advisory councils formed by the Alaska Board of Fisheries, since the board represents the definitive and final stage of the regulation forming process.

On the federal level, private organiztions play a similar role through their participation in the meetings of the Regional Management Councils established by the FCMA, in Alaska, the North Pacific Fisheries Management Council. Besides testifying at hearings of the Council, representatives of the organizations participate as members of the advisory panels established by the Council. Whereas the Scientific and Statistical Committee of the North Pacific Fisheries Management Council is composed of university professors and professionals in the field of fishery management, the advisory panel is composed largely of fishermen, processors, and representatives of their organization. The advisory panel of the North Pacific Council has 25 members, of which seven represent fishermen's associations and two represent processors (other members of the panel represent both groups unofficially by virtue of their close association with one or the other).

The organizations also attempt to influence policy at the legislative level, by lobbying their representation in the state legislature and U.S. Congress.

Since input at both of these levels is quasi-political, the impact of an organization depends to a certain extent on traditional political factors: for processors, their contribution to

the gross national income and to export, the number of people they employ, etc.; for fishermen's organizations, the number of voters they represent, the extent to which their communities depend upon them for a livelihood, etc. But in the final analysis, the impact of a private organization on the formulation of fisheries law depends largely on the aggressiveness and wisdom of its members and leadership.

FOOTNOTE

[1] See also the further discussion of search and seizure in PART IV.

PART IV

The Justice System and Enforcement Practices

Public Protection and Individual Freedom

Americans are not a law abiding people because of law enforcement. In some senses the two contradict each other. Countries with larger law enforcement agencies are the least law abiding. It is no accident. A well-governed country relies on public education and informed self-interest for compliance with the greater body of its laws. It is as true in maritime law as in any other phase. We cannot put coastal patrols everywhere. We would not like it if we could.

Sometimes the law will be totally or partially self-executing. For instance, establishment of a rule that automobiles will keep to the right of the highway or that vessels approaching each other will pass port-to-port are followed out of the mutual interest of the parties and rarely need specific enforcement.

The habit of obedience to law and the accepted moral authority of law also provide important support to law, particularly in democratic countries where a citizen has a sense of participation in the making of rules and control over enforcement policy.

Thus policies which provide for the dissemination of information about laws, the reason for their enactment and the legitimacy of the enacting authority are basic to enforcement policy.

The Territorial Experience

The Alaskan fisheries have a special history which illuminates these principles.

In the territorial period, Alaskans did not see that they participated in the making or enforcement of laws. The laws sometimes seemed to have been enacted for the benefit of others, better represented in the Congress of the United States, and were carried out by agency offices staffed by federal administrators having no Alaskan roots. Alaska Eskimos, Indians and Aleuts have not only experienced the same use of the law for oppressive purposes but have seen it also as diminishing historic, customary national, tribal, or family jurisdictions of Indian peoples over resources.

Fisheries law in Alaska has developed against a background of remembered history of apparent plenitude in which laws relating to resource conservation or allocation made no sense or reflected the short term interests of outsiders.

Despite claims of "too much government," government has been a rather rare commodity in the fisheries of Alaska where the fisherman or the community of the vessel has frequently had to be a law into itself. The spirit of rugged individualism, which is rarely found in America in as pure a form as in American fishermen, is to some extent at war with the concept of law and the regulated society. Thus the enforcement of law in Alaska fisheries has faced an uphill fight, in which distance, rapid

change and communications and educational lag have provided a basis for stubborn resistance.

Alaskan history might be compared with the history of the emergence of the United States of America in a number of these respects. The English sovereign was remote. The colonists didn't participate in the making of laws which frequently seemed to make no sense or ran against the interests of the Americans. Enforcement policy and practices were controlled by hostile, distant directors and frequently seemed to intrude unnecessarily on the business and privacy of England's American subjects. Dissenting views were suppressed.

Rights and Technicalities

This experience helped to formulate certain negative American attitudes towards any central authority and become the foundation for the Bill of Rights (the first ten amendments to the Constitution of the United States), which established the strict limitations on government authority, enforced through the courts, which are the hallwork of the American system. Even when implementing legitimate and important laws, such as criminal statutes, in dealing with the private rights of any person, government officials must abide by restrictions placed on their behavior. Sometimes these restraints seem technical but it very much depends upon the point of view of the observer whether a restraint on government action is a "right" or a "technicality."

Further, it sometimes seems unreasonable to extend rights to

everyone when some people seem so clearly undeserving. But separating the worthy and unworthy has also been an age old problem which comes down to a definition of worthiness that is in the eye of the beholder.

In fact, everyone does not have the same rights. An arrested person does not have the same rights as a person not arrested. A person who have been convicted previously is almost always treated more harshly than a person who has no record. Different conditions of release or bail amounts are set depending on the charges filed against an individual and his status in the community. Some of these do not seem necessarily fair. A wealthy person has a greater choice in selection of counsel, for example. But within broad and well-established categories, we cannot let the quality of a person's rights depend upon the discretionary decision of a government official. If that situation were allowed, everyone's rights would tend to slide to the lowest common denominator favoring the government against the individual. Much of our current constitutional law on the application of individual rights to persons charged with common crimes arose in a period when a dramatic example of the use of criminal statutes to crush democratic opposition was being played out in Nazi Germany. This problem was shown to be no foreign anomaly when the use of criminal statutes became widespread in this country in the 1960's to suppress locally unpopular views on race, war, dress and other matters.

Public Protection vs. Individual Liberty

All nations face the same basic dilemma: how to effectuate the interests of the state in public protection and law enforcement in balance against the freedom of the individual. America is one of a very small number of countries where that balance is determined in large part by constitutional limitations on governmental authority, legal principles which prevent the balance from being tipped against the individual beyond a line established by precedent or even by legislation. Under the American system the location of that line is determined by the Supreme Court of the United States and, to an increasing extent, the supreme courts of each of the several states interpreting their own constitutions, following principles of doctrinal interpretation involving language, history, precedent (earlier judicial opinions), the balance of contending social principles and the lessons of accumulated experience.

The Sweeping Scope of Privacy Interests

In originally addressing this issue, the founding fathers focused on some particular and specific issues, for example: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. . ." The First Amendment was addressing the individual's right to privacy in matters of conscience in opposition to legal requirements of conformity of thought and action to the "established" Church of England which closely related to political loyalty to the crown.

The Third Amendment, which prohibited the quartering of

soldiers in any house without the consent of the owner, has seen no recent application. This prohibition reflected the practice in colonial times of "emergency" billeting of soldiers in private homes when barracks were not available.[1] Again, it can be seen as a specific protection included within a broader social interest in keeping government agents out of the people's private places and affairs.

The amendments which have the greatest bearing on the day to day work of the law enforcement officer involve intrusions on the privacy and autonomy of property described in the "search and seizure" provision, the Fourth Amendment, and intrusions on a person's privacy of thought embraced by the Fifth Amendment, which orders that a person shall not "be compelled in a criminal case to be a witness against himself."

Over two centuries, changes in technology, in social and economic circumstance and in the way we look at our rights in relation to government, have produced an evolving understanding of the elements of social life in which privacy is an important value and a greater recognition of the broad potential for abuse of personal privacy if the conceptual framework of protection is allowed to stand still. The federal constitutional amendments were literally designed to address only particular examples, which history may have passed by, such as quartering of soldiers. To give these constitutional protections continuing meaning they have had to be interpreted afresh against changing circumstances by courts or restated by legislatures or by the people through

political action. At the state level, in Alaska for example, a "right of privacy" has been adopted as a specific constitutional amendment, which gives the courts a charter to fill in the space between the particular problems of privacy identified elsewhere in the constitution. U.S. Supreme Court decisions over many years have lead to the establishment of a wobbly line of protection, drawn around privacy interests of the individual, defining a penumbra extending beyond the particular language of each constitutional amendment.

Right to Remain Silent, Right to Counsel and Exclusionary Rule

The effect of the Fifth Amendment would be avoided if a person could be compelled, coerced or tricked into giving testimony which later would be admitted into testimony in a criminal trial. Accordingly, against a background of experience of chronic abuse, the courts expanded the effect of the Fifth Amendment to prohibit the introduction of testimony obtained in a custodial interrogation in advance of trial unless a person has been formally advised of his right to counsel.[2] The advice must include reference to his right to have counsel furnished, if necessary, at government expense. After the right to notice arises, the suspect's statements may not be admitted in evidence unless he has waived those rights. This is the famous "Miranda Warning" which must be given in more serious cases (as when custody of the individual is taken or contemplated).[3] The prohibition on introducing testimony of statements taken without preface by this warning is one example of the "Exclusionary Rule," a prohibition

on the introduction at trial of evidence taken in violation of a constitutional right. The exclusionary rule also applies to evidence taken as a result of an unlawful search or seizure in violation of the Fourth Amendment.

The average citizen thinks the exclusionary rule means that the defendant gets off free. He is mistaken. This happens but rarely. The exclusionary rule means only that the defendant may not be convicted on the particular, illegally seized evidence or improperly taken statement. Usually there is other evidence sufficient to provide a conviction untainted by the government's illegal acts. Sometimes where there is a close question on the legality of the taking of the statement or other evidence, the trial judge will allow the evidence in. If the appellate judge finds the trial judge shouldn't have allowed that particular evidence to be given to the jury, the case may be remanded for a new trial. Constitutional restrictions with respect to custodial interrogation and on search and seizure practices of governmental agents apply to and on vessels but according to a maritime standard of "reasonableness."

Role of the Warrant

The longstanding historic protection against searches and seizures, predating even the constitution, is the warrant. The warrant is the document of authority which gives a government officer the power to search private places and to seize persons or property. Before the American revolution, there was notorious abuse of the privacy interests of individuals by government offi-

cers asserting that, because they were policemen or government agents, that alone gave them the power to search private places or seize persons and property. Such unrestrained power is also dangerous to policemen in that persons who find their homes invaded by persons not showing specific authority are more apt to resist by force.

Probable Cause

The effect of the requirement of a warrant is to interpose between the zealous officer and the citizen a more neutral judicial officer trained in the balancing of rights of privacy and public security. The magistrate is called on to exercise a neutral judgment as to whether "probable cause" exists for the search warrant. Probable cause consists of evidence which would persuade a reasonable person to believe that a crime had been committed and that some evidence of the crime can be found at the place identified in the warrant or that the person charged can be found there. The quality of evidence required to authorize the issue of a warrant, "probable cause," is not the same as that required to convict a person (beyond a reasonable doubt) or even to win in a civil suit (preponderance of the evidence). Information from a usually reliable informant, for example, is enough to support an application for a search warrant.

Warrantless Searches

Reading the warrant clause with the search and seizure clause, the courts long ago decided that the search was an unreasonable one, if, practically speaking, a warrant could be

obtained but it was not. Obviously, in many cases, by the time the police officer finds a magistrate and pursuades him of the need for a warrant, the evidence will be gone. Accordingly, while the requirement of a warrant issued "upon probable cause supported by oath or affirmation and particularity describing the place to be searched and the person or things to be seized" is the first line of protection for privacy interests, there are many exceptions. Obviously, maritime law must allow many exceptions considering the practical obstacles that stand in the way of an officer at sea obtaining a warrant covering places at sea.

Government employees are entitled to make searches and question people with regard to offenses without warrant if it is a part of their job and falls within one or another well-established "exigent circumstance." A search may be made, for example, as an "incident to arrest," where the search is necessary to protect the officer or a seizure is necessary to prevent the imminent destruction of evidence.

An authorized officer may look for and sequester contraband or evidence "in plain view," when the officer is otherwise lawfully in the place where the plain view opportunity occurs. A search incident to arrest includes a search of the person or the area of the premises within the suspect's "immediate control." In addition, if "exigent circumstances" exist such as the probability of imminent destruction of narcotic drugs, for example, it is reasonable to conduct a search without a warrant.

The Supreme Court has recently held, however, that a law officer may not arrest a person in his home and use the arrest as an opportunity to search the premises "within his immediate control" without a search warrant when there is time to get an arrest warrant. A temporary seizure and search (stop and frisk) may be made for purposes of investigation if there are significant suspicious circumstances.

Administrative Searches: In Absence of Owner

Of special importance in maritime law, a variety of administrative searches are allowed: on warrant, for less than probable cause, or without warrant, where other administrative safeguards are present, to look, on land, for health, fire and housing code violations or, at sea, for inspections in enforcement of customs and immigration and maritime safety.

In one significant case, Nathason v. State (1976), the Supreme Court of Alaska upheld the validity of a search conducted of crab pots without a warrant and without giving notification to the owner of the officers' intent to search. The court ruled that since the owner of the pots was absent, there was no one in control at the time of the search. Moreover, the court noted that the crab pots, clearly marked by buoys, were in plain view and that the owner had no reasonable expectation of privacy. As a practical precaution, if officers wish to search an entire boat, they normally follow the established procedures gathering evidence of probable cause and obtaining a warrant.

Consent Searches

Finally, a person may "consent" to a search, sometimes consenting under circumstances where the voluntariness of the search is a matter of some conjecture. For example, federal court rulings have held that an individual who speaks to another, in private, has consented to any use of that conversation such as a surreptitious broadcast or recording of it. The State of Alaska departed from this federal constitutional principle (which had been established in a 5-4 supreme court ruling) by finding that under the state's privacy amendment, it was an unconstitutional intrusion on privacy to "wire an informant for sound" without a warrant when no special exigent (or emergency) circumstances were present since the suspect's expectation of privacy was intruded upon.

In its onshore context, the Fourth Amendment has developed an elaborate set of rules governing the validity of searches and seizures. These rules are "enforced" largely through the exclusionary rule, though civil remedies (for trespass, false arrest, invasion of privacy) may sometimes apply.

We will have occasion to comment at greater length on the key role of consent with respect to practical, administrative approaches to enforcement.

The Administrative Search

In the contemporary context of enforcement of administrative regulation, the administrative search has become increasingly

important. It has widespread application in maritime enforcement. As a practical matter, regulation of mine safety, for example (Donovan v. Dewey 69 L.ed 262 (1981)), will not work if a warrant based on probable cause was to be required each time an inspection took place. With such notice, it is very easy to disguise safety or health hazards on a temporary basis thus defeating the purpose of the Act.

Under such circumstances, the Supreme Court of the United States has allowed warrantless inspections if there are other safeguards to assure that the searches are not made in a vindictive, harassing, or invidiously selective manner. The court indicated the validity of a warrantless administrative search depended upon field discretion being controlled by specific rules. Rules must control who is to be searched (all vessels better than one picked at the whim of an enforcement officer), frequency and purpose. The person experiencing the inspection should "not be left to wonder about the puspose of the inspector or the limits of his task." Forcible entry was not permitted in Donovan without a court order which could address future refusals.

In U.S. v. Freeman, 579 F.2d 942, in 1978, the Fifth Circuit Court of Appeals suggested five criteria for assessing the reasonableness of a maritime search: (1) would a less intrusive approach work? (2) was there a history of aceptance of the practice? (3) the ratio of innocence to guilty (i.e., did the search practice involve extensive search of people who had not

committed the offense in question?); (4) the extent to which the search was conducted under hostile circumstances; and (5) the extent of stigmatization from the search.

The Maritime Context of Search and Arrest

In the maritime context, the reasonableness of the search must again be examined in light of whether a warrant was obtained or whether circumstances excuse the absence of the warrant. Where a warrant is required, the magistrate will require some showing of need for the search or seizure. Whether the search falls within an exception to the warrant requirement will depend upon a great many factors which bear on the "reasonableness" of the search under varying circumstances but which necessarily result in confusion in predicting the "reasonableness" of a particular proposed search.

The principal circumstances which determine the reasonableness of a maritime administrative search are: who is conducting the search, on which vessel or premises the search takes place, where the search takes place in relation to geographic jurisdictional lines and in relation to any area in which the inspecting authority has an interest, why the search takes place (in the sense of the putative purpose of the search), the extent of the search, the size of the vessel, what areas and what papers or matters are invaded, the manner or style in which the search or inspection is carried out with respect to use of force, voluntariness, and conformity with established procedures, and when the search takes place, in terms of time of day and pertinence to

time frame of an enforcement obligation.

Each of these considerations needs to explored in detail. The historical and institutional background gives the application of the bill of rights at sea a special flavor.

Influence of Agency History and Role

The approach used by a Coast Guard cutter in making inspections is controlled by a manual of directions. A Food and Drug inspector has a different approach and a police detective yet another. Who is conducting a search or investigation will determine a good deal about how it is carried out. Constitutional limitations on search and inquiry to some extent reflect the nature of the agency carrying it out and the agency's historic role in law enforcement in America. While it may seem strange that constitutional applications should vary according to this kind of criteria (and the logical inconsistencies resulting are bothersome even to lawyers and judges), inevitably confusion arises when we try to give meaning to the term "reasonable." Reasonableness knows no absolutes but is conditioned by the surrounding circumstances including the expectancies of the persons involved. If the Coast Guard has been conducting a certain style of search for a hundred years or more, persons subject to that search grow to expect it and the search becomes reasonable. It is the unpredictable, the surprise, which is unreasonably intrusive.

Thus, ironically, the efforts of the courts to tailor reason-

ableness to particular situations as opposed to using a "bright line" approach (all warrantless searches are illegal, for example), is inherently self-defeating because the uncertainty which results from excessive particularity is more likely to make the legality of any specific search less predictable.

Traditions and styles in law enforcement are as varied as the number of agencies that have delegated to them, by some governmental authority, the power of enforcement. An enforcement agency, such as the Coast Guard, is built quite literally on a military model. Others, like the Environmental Protection Agency, are very little influenced by the military tradition, the hierarchical command structure, the uniforms and the more rigid and authoritative style that comes with that approach. The features characteristic of the military model are important for the psychological impact which they have on the public and the power imbalance which they impose on interpersonal relations. The courts have been sensitive to the impact of such factors on the voluntariness of confessions and consents, for example. The implication that an interview is in a custodial setting is much easier to find when the person doing the questioning is known to be a police officer, an officer vested with general law enforcement authority.

Enforcement agencies can be divided up according to whether they are given only a very special range of laws to enforce or are given general authority. Fish and Wildlife officers, charged only with the enforcement of game offenses, have and are gener-

ally seen as having a different approach in relating to the public than peace officers, those authorized by law to enforce all the penal laws of the sovereign jurisdiction assigning enforcement authority.

Agencies also vary in the extent to which they are assigned other duties which influence the way they carry out their tasks and in the degree that they respond only after the fact to emergencies rather than playing a major role in prevention.

Federal-State Division of Responsibility

Under the American federal system, each state exercises substantial sovereignty over its affairs while a separate sovereign, the United States, exercises jurisdiction over topics of special national significance. This distinction has resulted in a general division in traditions and roles between federal enforcement and state enforcement agencies which relates in large part to the focus of public accountability of the agency.

In comparison with the American System, Continental European law enforcement models are highly centralized. Federalism in Europe involves less sweeping devolution of power. Command and policy control for enforcement activity runs to a central governmental authority which does not have the same tradition of accountability to the average citizen as prevails in Anglo-American systems.

The United States government got along well into the 20th century without any law enforcement beyond that provided by Coast

Guard and Treasury in the enforcement of customs and immigration laws. General law enforcement activity was conducted under state authority but by locality, rarely directed from the state level. Enforcement was a localized activity, arising not from the need of the central government, but from the requirements of community life. As a result, accountability was local in nature and law enforcement practices developed with a considerable degree of diffidence to community expectations. This was no guarantee of respect for individual rights but it did mean that enforcement was more popular with local leadership.

Where the Search is Conducted

From its beginnings, federal authority, particularly its maritime exercise, was nationally and externally oriented. State control over foreign and interstate commerce was specifically removed from the power (and prejudices) of local concern and given to the Congress.

Federal case law defining and establishing Fourth and Fifth Amendment rights had a period of development prior to the application of these amendments to the states (through interpretation of the 14th amendment). During that earlier period (prior to Mapp v. Ohio 367 U.S. 643 (1961)), state law enforcement operated with considerable freedom from such restraints. Thus stricter scrutiny of practices infringing on personal rights come first at the federal level. However, in the maritime situation, where the government was dealing with nations or foreign citizens, and operating outside or in the context of the territorial limits of

the United States, there was considerable question whether constitutional limits imposed by the bill of rights had any application at all. When it finally was decided that they did, then the context provided an entirely different basis for judging reasonableness.

One such contextual question involves the nature of the vessel or the premises on which the search takes place. A vessel is a type of vehicle. The searching of vehicles has proven to be a swamp between the terra firma of individual rights and the encroaching waters of practical enforcement imperatives. Automobile cases have constituted the single largest volume of search and seizure cases on the appellate docket. In 1982 the United States Supreme Court decided that a search of any part of a vehicle or of anything in it where an item sought might reasonably be found was reasonable so long as the police officer had probable cause to believe the item (usually drugs) was in the vehicle. The court, in an effort to draw a bright line distinction that police officers could undersand, in effect held that the mobility characteristics of vehicles made all auto searches exigent and did away with the warrant requirement.

But many vessels are not just vehicular conveniences. They are homes to the crew and passengers. The adage that "An Englishman's Home is his Castle" expresses a sentiment regarding the special sanctity of place that all can identify with. For that matter, the increasing use of mobile and caravan homes is likely to assure that search of vehicles will continue, a hydra-

headed monster defeating all "bright lines" sword slashes.

The vessel has not produced such a plethora of case law dispute for a variety of reasons. First, the maritime world has itself been dominated by military traditions. As late as the War of 1812, the distinction between privateers and ships of war was a near one. The merchant marine is even now, in emergencies, an auxiliary branch of the navy. Military scruples with regard to privacy interests have never been extensive. Employer-employee relationships in the maritime setting, influences by this tradition, are paternalistic on the one hand, imposing obligations on the employer not contemplated in the bargained and transient relations of the land. On the other hand, the social order of shipboard relations is autocratic. The captain of the vessel is both private employer and public government.

Armed with his public and private authority, there are no sanctified places to the master of a vessel. Thus, with respect to the larger vessels the consent or order of the master, readily given in most cases to cooperating authority, settled any Fourth Amendment question. This claim of historical precedent is subject to challenge by contemporary values, but, for some time, most of the issues will continue to be resolved in the law enforcement context on ships by the power of the master.

Influence of Territorial Water Zones

In the situation where the captain declined consent, other public authority often declined to intervene or was faced down in

confrontation with a putative assertion of maritime authority. The ship's master was left to deal with his own except for the cases most intrusive on the external community. Calls for assistance come from the master of the vessel. If he does not call then that usually ends it.

Federal admiralty jurisdiction does not apply within territorial waters of states, so crimes committed in this zone, or in port, are offenses against state laws. If one fisherman shoots another while the vessel is in port of Anchorage, the Anchorage Police Department will be the arresting authority; it will not be a federal offense.

On the high seas, foreign vessels are subject to flag state authority. U.S. Law enforcement (Coast Guard) will intervene only if requested to do so by the flag state.

On the high seas, U.S. vessels are subject to U.S. laws as flag state authority. Accordingly, the Coast Guard has jurisdiction for enforcing U.S. laws on the high seas.

Within territorial seas and in port the Coast Guard will intervene on a foreign vessel only if the crime presents some sort of threat to shoreside facilities. Local or state law enforcement will intervene for offenses against state laws. U.S. vessels are, of course, subject to the laws of the state also.

In the context of violations of statefisheries regulations, the master of the vessel will also often be under suspicion of

complicity in the suspected offense in which case, assuming the standard procedural requirements for an inspection search exist, then the search may address the areas which are appropriate to the offense.

If, for instance, the master (of a fishing vessel) refused to permit a party to board and inspect, if the officers had a search warrant they would physically subdue the fisherman and then carry out their inspection. If they did not have a search warrant they would probably get one, then do the same. Note that state courts are going to look at state enforcement at sea in the context of land-based principles of search and seizure. The easier federal tradition of search at sea will not necessarily carry the day.

Federal Searches at Sea

It is Coast Guard policy not to attempt to board foreign vessels by force unless fired upon, without higher consultation. Officers on board do not have the authority to fire upon foreign fishing vessels. Authority comes from Commandant of the Coast Guard in consultation with others (i.e., State Department). But under these guidelines, in 1981, the Coast Guard Cutter Confidence fired three warning rounds at a Japanese fishing vessel seeking to elude it (Anchorage Daily News, Sunday, June 14).

This is a rare occurrence. It is highly unusual for a vessel to seek to elude a boarding party. A fine is likely to be much higher than what it would be normally because of the fact that

the vessel tried to get away, a likelihood of which vessel owners and masters are aware.

Both Customs Service and Coast Guard have broad powers to inspect and search vessels without a warrant.

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or withinthe customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

(19 USC 1581). 14 USC 89 grants essentially the same powers to the Coast Guard.

However, legal questions persist. The blanket grant of authority, given by Congreee years before the Supreme Court's increased vigilance on Fourth Amendment issues, may not be constitutional in extreme cases. The courts have upheld validity of warrantless searches for fisheries enforcement, safety and documentation inspections, etc. Questions are left, however, concerning the extent of these searches, and the admissibility of evidence obtained regarding illegal cargo as a result of such searches.

In the Piner case (1979, California) the Coast Guard boarded a pleasure vessel, Delphene, in San Francisco Bay for routine safety inspection. Once on board an officer noticed, in plain view through a door to a lighted cabin, bags of marijuana.

Arrest and seizure followed. U.S. District Court (9th) ruled for suppression of evidence because (1) there was no apparent reason to suspect a violation of a safety regulation and (2) either there was no established policy of boarding every vessel, or no administrative scheme governing decisions to board existed. (The evidence indicated that the Delphene was selected because it was the only vessel in the area and the Coast Guard vessel had "nothing else to do".) Therefore, the court held, the search was unreasonable under the Fourth Amendment. The Piner decision, however, represents a narrow interpretation of the Coast Guard's authority to board and inspect vessels.

Other, later decisions have been somewhat broader. For instance, in U.S. v. Hilton (Maine, 1980) it was held:

> The Coast Guard's practice of stopping American vessels on the high seas for safety and documentation inspections, with or without suspicion of wrongdoing, constitutes an exception to the usual rule that warrantless searches are per se unreasonable, but such exception does not authorize Coast Guard officers to explore vessel beyond a search reasonably incident to a safety and documentation inspection and does not give carte blanche to search private books, papers, or other effects or areas of a vessel not related to purposes of such an inspection.
>
> The Fourth Amendment requires at least a reasonable suspicion that contraband or evidence of criminal activity will be found before the Coast Guard, pursuant to authority of this section, may stop and board a vessel on the high seas and search any "private" area of the hold of a vessel for the purpose of finding such items.

It seems clear that searches for evidence of non-fishing criminal activity require, if not a warrant, reasonable or probable cause. In U.S. v. Warren (Florida, 1977), the court held

that "The fact that the shrimp boat was in an area in which no shrimping was done and did not have its shrimping nets out ready to use did not provide probable cause for the Coast Guard to stop and search the vessel for criminal violations."

The above cases concerned the question of drug smuggling, but it seems probable that the same guidelines will apply to other types of illicit cargo that are more likely to be of concern in fisheries enforcement in Alaska.

The Key Role of Consent

We have earlier commented on the contrast in tradition between centrally controlled enforcement of laws reflecting national interest (sometimes in opposition to local community interest) and locally developed law and enforcement processes. In the localized, domestic setting, law enforcement is more clearly based on consent of the governed. Obedience to law easily depends on the voluntary cooperation of the public. Under such circumstances, it is natural enough that the practical, fundamental basis for investigative search and inquiry should be individual consent. From a conceptual viewpoint, consent is classified as an exception or justification for a warrantless search. In practice, voluntary accession to inquiry and search is the mainstay of law enforcement information gathering, the point of beginning in successful law enforcement.

In most situations it is of key importance that the search be carried out in a way which emphasizes the citizen's voluntary

role in law enforcement. While a search or inquiry that is conducted aggressively, on an adversary basis, may be more productive in an individual case, every time that approach is used it leaves a residue of antagonism in the individual subject to the inquiry or search which makes it more difficult to elicit that essential voluntary cooperation in the future in any other law enforcement context. At some level of excess, this can lead to the alienation of entire sub-population groups which begin to perceive of enforcement not as being a popularly delegated function operating in the community interest but a force outside the community, imposed for the benefit of outsiders and by agents of unresponsive, bureaucratic, government forces.

This alienation can occur with respect to an age group - e.g., teenagers, an ethnic minority, a neighborhood, or in a fishery or among a sub-class of fishermen. Thus a constant responsibility of preventive or enforcement activity, while engaged in inquiry and search, is reinforcement of the identity of the policing role with community interest, and public education in the usefulness of the underlying laws and the necessity of enforcement cooperation as a public duty.

With or without a consciousness of the central importance of the political background to consent-based search and inquiry, practically oriented law enforcement officers have always recognized the superiority of consensual response. At the minimum level, there is much less complication than is the case when a warrant must be obtained or when the justification for warrant-

less searches must be tested in court. Experience also shows that the enforcement officer is usually going to find out much more in talking with an individual or "being shown around" on an informal, cooperative and supposedly friendly basis than through confrontational tactics. Friendliness is disarming. Surprisingly enough, this is often the case even when the person of whom the inquiry is being made becomes, as a result of the search or inquiry, a focus of investigation.

The contrast between locally based enforcement and national enforcement is presented sharply by the instruction given in the Coast Guard Boarding Manual, "Boarding officers should not request permission to board. Such requests are an open invitation for uncooperative persons to say "no." (U.S.C.G. DOT Boarding Manual § III-1(b) at 3-1 (1977))

As consent is the broadest avenue to search and inquiry, it is not surprising that a great body of case law examines the limits of consent - where consent turns into non-consent.

We have mentioned that the kind of restraints that are imposed on law enforcement agencies vary according to the mission of the agency, historic background, and other factors which touch on the "reasonableness" of the search under the circumstances. Despite their high degree of variability, these are constitutional limitations we are talking about. That is, they are limitations, for the benefit of individual rights, imposed on governmental action. Thus only governmental action is subject to scru-

tiny upon these standards.

State Action Doctrine

The Fourth Amendment opens with the phrase "the right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizure, shall not be violated. . ." (emphasis added) First of all, the right is against government only. An airline employee who opens a traveler's bag or a trespasser who boards a vessel and takes or reports objects to the police are not covered. Though such private actions may violate a common law or statutory right given to the individual by legislative act, they do not violate a constitutional prohibition. It is not a "state action," meaning an act undertaken by a government employee.

Intrusions by individuals not acting in a governmental capacity may stir up all kinds of revealing information. Sometimes information comes to law enforcement as a result of private, conspicuously illegal acts - trespass or burglary, for example. The citizen's protection from such intrusion is through civil action (for damages) or criminal prosecution. There is no constitutional umbrella. The Fourth and Fifth Amendments protect the citizen only from persons acting under the color of lawful authority. Accordingly, law enforcement is free to use the fruit of a private, unwarranted search or admissions gathered by informers from suspects not given a "Miranda" warning (more of this later), so long as the activity was truly not instigated or

supported by government authority.

Needless to say, some enforcement officers have tested this distinction to extremes, coming too close to "supporting" private action with unhappy consequences for enforcement since the fruit of such conduct may not be admitted as evidence in a court of law under the "exclusionary rule." Since the evidence was gathered without a warrant under government sponsorship under circumstances where the "consent" of the person providing the information or controlling the area of inquiry was necessary, "state (government) action" is implied and the constitution is applied.

In Massiah v. United States[4] the court rejected radio-transmitted statements taken from a defendant by a police informer after the suspect had been indicted. The court drew a distinction based on the Sixth Amendment right to counsel, which overlaps with the Fifth Amendment right to remain silent. Though a suspect has no expectancy of privacy in dealing with possible government agents before his arrest, once this has occurred, he should be free of such intrusion.

In Alaska, officers acting under state authority face a more restrictive rule. Under Glass v. State,[5] the state's constitutional right of privacy was interpreted to prohibit the enforcement authority from wiring an informer even before arrest, unless a search warrant is first obtained.

The Miranda Warning

One of the most famous controversies in this area arose out of the attempt of the Supreme Court to draw a "bright line" between responses to an interrogation which are voluntary and those that are not, the "Miranda Warning" controversy.

In an attempt to establish an understandable distinction, which could be conveniently administered, between custodial interrogation which produced truly voluntary statements and statements taken in an atmosphere tainted by implied coercion, the Supreme Court mandated that a suspect be warned of his rights to counsel according to a specific formula.

Although the rule has been much criticized, it is not without its supporters who ask, among other questions, what the alternative might be. As the highly respected Judge Frank Johnson of the Fifth Circuit Court of Appeals has said, "The rigidity of the Miranda rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength."

In most actual enforcement situations, the Miranda warning has a certain perfunctory nature to it. It can be meaningless. A great many offenders are well aware of their rights. The person being warned is subject to many other emotional impulses which prevent him from really listening. Despite the non-communicative aspects of the warning, the courts do apply it, as Judge Johnson said, rigidly. It can be distressing that seem-

ingly minor and accidental imperfections in the warning spoil the evidentiary value of all that follows. But in any case, the warning serves as a reminder to all present that, in contrast to dictatorships and the less free areas of the world, we operate according to principles of law and the enforcement officer is a servant of that law, never a law unto himself.

That principle is embodied in the more recent development of the law relating to the admissibility of confessions. In the 18th and 19th century the admissibility of a confession or admission was based only on an evaluation of trustworthiness. The question arose in the context of relatively broad use of some form of torture or physical abuse as a method of law enforcement investigation in earlier times. Apart from the affront to human dignity involved, it often appeared that a person would make a variety of statements which were not true, even if against interest, when motivated by fear in a custodial setting.

In the 20th century the standard has been moved by a greater concern for human dignity and repugnance for police practices which infringe on it.

In the everyday practice of the enforcement officer in the maritime context, the Miranda warning[6] is not as important as it would at first seem.

In the first place, the Miranda warning applies only to "custodial" interrogation. Maritime violations, particularly fisheries violations, seldom involve an arrest with immediate

custodial consequences. The officer usually proceeds via citation. Additionally, (though the U.S. Supreme Court has not ruled on this) lower courts have said that Miranda applies only to felony offenses. An interrogation, even a custodial interrogation, which involves questioning about a misdemeanor, lower appellate court judges have ruled, may be made without a Miranda warning, even though subsequently the suspect is charged with a felony.

While Alaska is more likely to follow the dissenter's reasoning that the nature of the interrogation, not the nature of the offense is what counts, still, the logic of the Miranda opinion suggests that it need rarely be necessary in the maritime situation. It is the coercive aspect of custodial interrogation which evoked the rule. A person being questioned on his boat about fishing violations is less likely to feel intimidated, even though he may not exactly feel free to leave. When a whole vessel is "arrested," still the sailor is in the company of his crewmates and is rarely likely to believe he faces more than economic sanctions. Accordingly, until courts begin to rule otherwise, an enforcement officer can forget about Miranda Warnings until interrogation leads the officer to suspect the situation is a felony or serious misdemeanor for which the person might anticipate being taken into custody.

Booking, Arraignment, Charging, Bail, Trial and Sentence

Booking, charging and bail are handled in the maritime context with very little distinction from land-based procedures.

The principal difference is that in fisheries and other maritime offenses, the vessel is normally seized to assure the appearance of the parties charged. Since the vessel is normally of a very high value, owners are quick to post bond to secure the vessel's release.

Where the vessel or men charged are not U.S. nationals, the case rarely goes to trial and an arrangement for a plea and appropriate disposition (usually a very large fine) are made on a government-to-government basis with the court being informed of the proposed settlement through the U.S. Attorney.

Depending on whether the offense is federal or state, the U.S. Attorney or the State District Attorney with regional authority will review the evidence and determine the proper charges to be filed against the defendant(s).

The roles of the parties and counsel are as occur in the ordinary criminal law. Where foreign speaking persons are charged, translators are made available to court expense.

Causes of Crime in a Fisheries Context

The prospect of economic gain is the source of virtually all crime in the fisheries field. The potential magnitude of financial gain to violators going uncaught is enormous. Seizures in the early 1980's have involved illegal catches of a half a million dollars or more taken within a very brief period of time. Fishing violations are thus more lucrative than robbing banks or even much sophisticated white collar crime. Although fishermen

in general realize that their continued long term livelihood requires sound conservation of the resource, the potential short term gain for such illegal activity as fishing briefly in a closed area is tremendous.

Among foreign fishermen, FCMA established a new type of management and conservation scheme which may conflict with their traditional notions of appropriate fishing practices. FCMA respects to a certain degree traditional fishing but only within the context of sustained yield management. The Soviet fleet for instance, had not historically fished within the systained yield context. The alternative technique was "pulse" fishing - take all you can out of the fishery, and when stocks become depleted, move to another fishery. Conservation is ultimately achieved because the unproductive fishery is simply abandoned until stocks rebuild themselves. The pulse scheme assumes that there will always be other fisheries to move to, that is, by the time stocks are depleted in a second or third fishery, the first will have had time to rebuild itself.

Although large sums of money can be made in a very brief period of time in fishing, the industry as a whole has the characteristic of being not very solvent. It is basically a cash industry because participants cannot be relied upon in use of checks, bills, etc. Basically, the industry is hazardous, high risk but with potential for more than substantial profits in a brief period of time. Moreover, it is highly regulated by the state and federal government. Historically, such characteristics

have often been associated with criminal activity.

FOOTNOTES

[1] While this provision has not been raised with respect to the posting of inspectors on vessels, it can be seen that in the extreme case, it might have application.

[2] The right to counsel at critical stages in criminal proceedings is guaranteed to the individual under the Sixth Amendment to the Constitution of the United States. Notice how the Fifth Amendment and Sixth Amendment overlap. Counsel is important in helping a person decide what he should say or not say and in interpreting the meaning and effect of what he has said after he has become a focus as a suspect in a felony investigation. The exclusionary rule applied to statements made of the accused without the assistance of counsel protects both Fifth and Sixth Amendment rights.

[3] The "Miranda warning" is of minor significance to most maritime law enforcement - see discussion page 21 infra.

[4] 337 U.S. 201; 12 L.ed.2d 246 (1964).

[5] The "Miranda warning" is of minor significance to most maritime law enforcement - see discussion p. 21 infra.

[6] A warning to the accused that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to consult with a lawyer before any further questioning takes place and to have a lawyer remain with him during any further questioning and that if he cannot afford counsel, a lawyer will be provided for him at government expense.

PART V. Some Horizons: Haves and Have-Nots in the International Community

The allocation of living marine resources among all the nations of the world is but one aspect of the overall problem of the distribution of the world's limited resources. Specifically, it might be regarded as an aspect of the world food problem. "Developing" countries with inadequate resources of various kinds look to the ocean as part of the common heritage of all mankind. These countries, as a group, would like to see the sea's resources somehow shared among all nations, even those that are landlocked. Fishermen from such nations are less likely to see fisheries conservation as having biological roots or the law as having a foundation in natural justice. Accordingly, they may be more likely to look at fisheries enforcement and evasion as a purely economic calculus.

Basic to the question of the distribution of the world's marine resources is the question of political orientation: the view of the world of the proponents of particular positions. The Law of the Sea Conference, Third Session, in the 1980's is attempting to deal with special problems of "developing" countries by providing them with preferential treatment on a number of concerns such as the allocation of funds and technolog-ical assistance.

The problem of "Haves vs. Have-nots" in the world community

is enormously complex. Traditional fishing cultures, both those which remain fairly "primitive" and those which reflect 20th century technological development, each carry with them a point of view.

The international aspect to the fisheries has not only complicated America's international relations but has an internal aspect from the immigration of individuals from the third world. The growing internationalization of fisheries activity has many implications for the future.

There are aliens in practically every processing plant in America. Some are immigrants, but technicians and supervisors from countries which will import the plant's product also play an important role. These individuals are in the United States on temporary visas for the duration of the season but replace each other.

Fishing is a seasonal industry. Though many fishermen and processors are diversifying to enable year-round operations, many will continue to operate for only brief periods of the year. Hence, there is a large presence of migratory labor in the processing industry. This includes a high proportion of immigrants or recent immigrants because they are more willing to work for lower wages. But more important, they bring fishing skills with them from the home country.

Traditionally, fishermen tend to be sons of fishermen. Fishing is often a family operation. The occupation passes from

generation to generation. Hence, it is natural that Vietnamese fishermen emigrating to the Gulf of Mexico area should become fishermen, rather than seeking new occupations in their new home. There are fewer U.S. fishermen per capita in the United States than in many other nations, especially those now supplying immigrants.

The developing fisheries of Alaska aim increasingly toward an export market (especially bottom fish). In the past, U.S. fishermen have not known how to catch these fish in a manner attractive to these markets. U.S. processors do not have a tradition of processing for these species or markets. By way of illustration, at a 1981 North Pacific Fisheries Management Concil meeting testimony attributed the success of a U.S. vessel involved in a joint bottom fish venture with a foreign factory ship to "a good Portuguese crew." Further testimony clarified that crew members were actually U.S. citizens or resident aliens - immigrants who brought their expertise and heritage with them - but that U.S. fishermen - native-born - had no experience in this fishery.

Except in a few localities such as Alaska, the fishing industry has never been a major factor in the U.S. economy. However, given the extent of U.S. fishery resources, the stated intention of developing these resources at a national level (FCMA) and the growing demand for food at a worldwide level, the industry will undoubtedly grow.

Drug Smuggling and Illicit Cargo

At present their appears to be no active relationship between fishing and illicit cargo (smuggling) in Alaska. Consequently, neither of the primary enforcement agencies (Coast Guard, Fish and Wildlife Protection) target upon the problem, i.e., boarding parties dedicate no particular effort to discovering illicit cargo in their searches. Drugs enter Alaska by air, or land. This is in sharp contrast to Florida where the value of drug trafficking is many times that of legitimate fishing efforts and Coast Guard and other law enforcement agencies are heavily involved, sometimes controversially, in the use of administrative searches as a screen for criminal investigative searches.

For geographic reasons, Alaska is not likely to become an entry point for drugs into the U.S. For the same reason, fishing vessels are not likely to be heavily involved in transporting drugs into Alaska. Other types of illicit cargo, especially prohibited marine mammal products (sea otter skins, raw ivory, etc.) present stronger probabilities of active involvement of fishing vessels.

In other parts of the U.S., i.e., Atlantic, Gulf of Mexico, there is and will continue to be an active relationship between fishing operations and drug smuggling operations. The U.S. Customs Service has primary responsibility over drugs, smuggling, and illicit cargo, but it shares this responsibility with the Coast Guard. Commissioned, warrant and petty officers of the Coast Guard are deemed to be officers of the customs and when so

acting shall, insofar as performance of the duties relating to customs law are concerned, be subject to regulations issued by the Secretary of the Treasury governing officers of the customs (14 USC 143).